FILED

JUL 21 1952

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

of the United States

October Term, 1952

No. 213

M. C. SCHAEFER,

Petitioner,

vs.

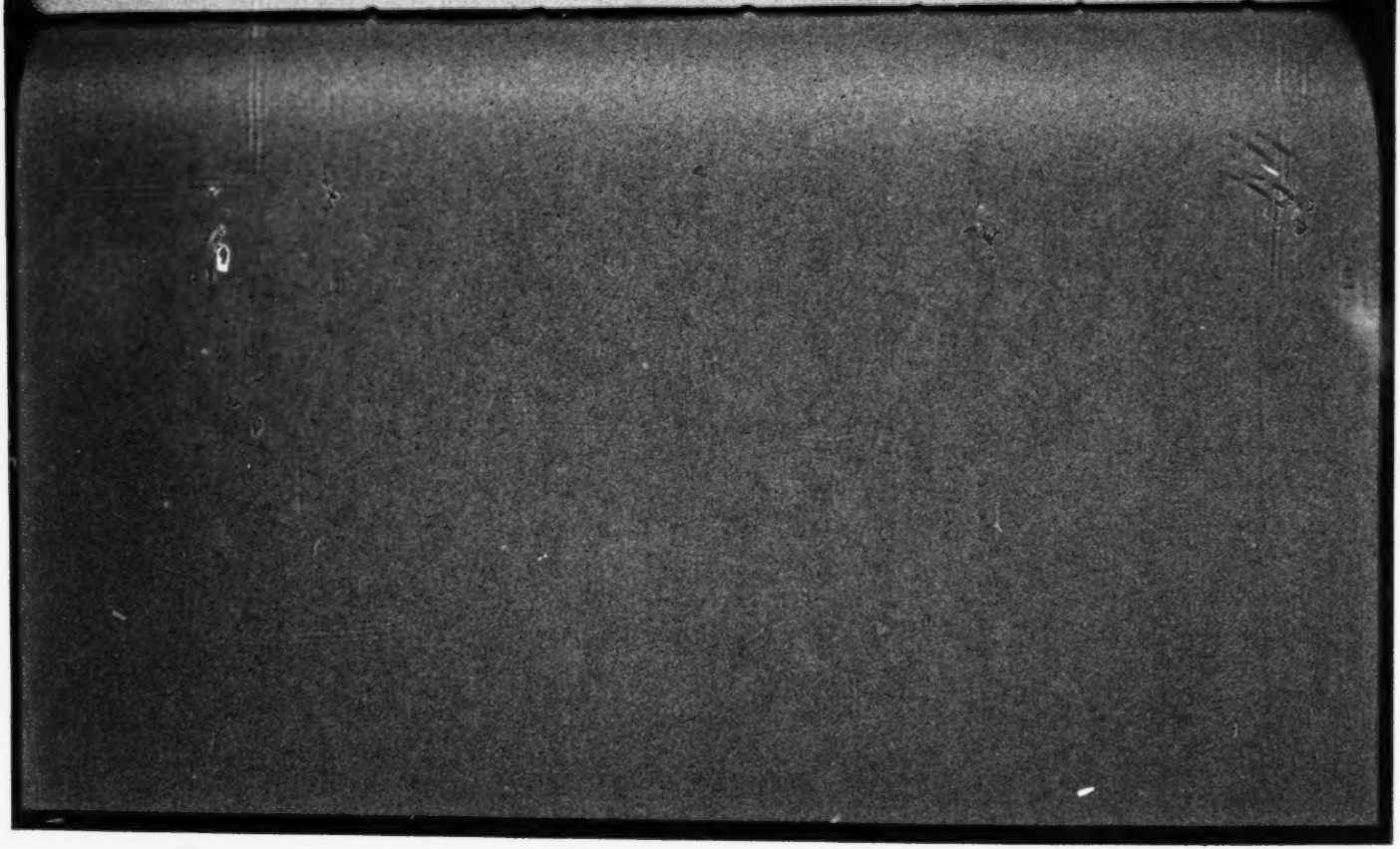
SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT
AND BRIEF IN SUPPORT OF PETITION

M. C. SCHAEFER,
Per Se,
Petitioner.

WILLIAMS-WIRTH LAW PUB. CO., PORTLAND, ORE.



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In the Supreme Court

of the United States

October Term, 1952

No._____

M. C. SCHAEFER,

Petitioner,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

To: HON. FRED M. VINSON, CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petition of M. C. Schaefer, an individual, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on April 25, 1952, sustaining the

Order of Dismissal by the District Court of the United States for the Western District of Washington, Northern Division, with prejudice of plaintiff's complaint, as twice amended, respectfully shows:

OPINIONS BELOW

The order of the District Court is not officially reported, nor is the opinion of the Circuit Court of Appeals; however, the final order of the District Court may be found in the record commencing at Page 532, and the opinion of the Circuit Court may be found in the record at page 656.

JURISDICTION

The opinion of the Circuit Court of Appeals was entered on April 25, 1952. The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

In the District Court and on appeal to the Circuit Court of Appeals, three questions of law were presented:

(1) Did Petitioner's complaint, as amended, state a cause of action against respondents for damages from conspiracy; and

(2) Had the statute of limitations run; and

(3) Should the Petitioner have been allowed to file a supplemental complaint naming one B. J. Rask as an additional party defendant.

Those questions are also presented here, but before this court there is also presented the far more important question; namely ,whether or not under Rule 38, 5b of the Supreme Court of the United States, the Circuit Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings in its own handling of this case and so far sanctioned such a departure from the usual course of judicial proceedings by the District Court Judges as to call for the exercise of this Court's supervision.

STATEMENT

This case arises out of a conspiracy on the part of a prominent Seattle attorney, W. R. McKelvy, a senior partner in the firm of Skeel, McKelvy, Henke, Evanson and Uhlmann; a nationally known bonding company, Continental Casualty Co.; a former high officer of said Continental Casualty Co., Clyde Philp, and his silent partner, A. J. Goerig; the latter two being also silent joint venturers with three persons, Sam Macri, Don Macri and Joe Macri, who were, and still are, taking on large construction contracts, but are totally incompetent to handle any construction contract (Appendix hereto—62 ff) and obviously are mere stooges and front men for said attorney, said bonding company and its principal officers. A conspiracy on the part of all these persons and organizations and probably others, to damage, injure and defraud Petitioner and as the proximate result of such conspiracy, Petitioner has

suffered severe damage (R-384-385) (Appendix hereto—56). NOTE: Philp and Goerig, though named, were not served because they were out of the country and the action was dismissed, as to them, for that reason.

When the original complaint herein was filed (December 1, 1950), motions to dismiss were directed at it by the several respondents, and Petitioner twice amended the complaint, to the last of which an Order of Dismissal with prejudice was entered from which Petitioner appealed. The action of the District Court was sustained by the Circuit Court of Appeals.

In the conduct of the case to date, four District Court judges and two court reporters along with three Circuit Court of Appeals judges have engaged in highly unusual conduct in this case.

Some of the highlights of Petitioner's case against respondents briefly and succinctly stated are: that Respondents Macri wilfully and negligently breached a contract with Petitioner, from the very start of work by Petitioner in March 1944, to the completion of Petitioner's work on this job (April 8, 1945), and was so found by Judge Driver at the time of trial of the Yakima suit (R-438 ff), by not doing their preparatory work, not supplying proper or adequate material, not making the required payments and intentionally stalling the work for the purpose of bankrupting Petitioner and taking his assets or to get Petitioner obligated

and gain control of Petitioner's organization; said contract being one in which your Petitioner subcontracted with the Macri's to perform certain concrete work on the Roza Irrigation Project near Yakima, Washington (a Bureau of Reclamation Project). That respondent Clyde Philp, Attorney-in-Fact for Continental Casualty Company, and his partner, A. J. Goerig, also were direct participants in this series of acts, they being silent joint venturers with the Macris. That Petitioner retained respondent W. R. McKelvy, a prominent Seattle, Washington attorney, and senior member of the law firm of Skeel, McKelvy, Henke, Evanson and Uhlmann, who accepted employment by petitioner on November 1, 1944 (before 1/3 of Petitioner's work on this job had been performed), to sue the Macris and Continental Casualty Company for the termination of said sub-contract and for the reasonable value (quantum meruit) of the work done to date, and to terminate a second sub-contract between the same parties on which no work had been done. Unknown to Petitioner at that time, respondent McKelvy and his firm at that very moment, and ever since, were, and have been general counsel in the State of Washington for Continental Casualty Company (one of the defendants in Petitioner's suit which McKelvy agreed to file; but, although assuring Petitioner from time to time that he would file shortly, he intentionally did not file the suit). All during this period of delay in filing (from 11-1-1944 to 10-20-1945, and knowing well that Peti-

tioner had a cause of action in quantum meruit, see McKelvy's office memo of 11-8-1944 which he inadvertently handed Petitioner on 10-20-1945, R-407 to 410 (Note: Petitioner later won his suit in quantum meruit, R-438 ff)), McKelvy urged petitioner to keep working toward completion of his contract with the Macris, which Petitioner did. Respondent McKelvy and his firm were also counsel for Continental Casualty Company's officer, Philp, and also counsel for said Macris. McKelvy handpicked the attorney, a Mr. Tom Holman, to purport to represent the Macris while this matter was pending in McKelvy's office (Tom Holman being a former associate in McKelvy's office). Said McKelvy intentionally misinformed Petitioner about his association with the other respondents. McKelvy also stalled until the Macris had an opportunity to hide their assets, then advised Petitioner that they had done so through what he called a spurious charge against one of the Macris' sons, that the son had embezzled funds. McKelvy attempted to influence Petitioner to fraudulently conceal his assets (R. 493 ff) and thereby defraud the United States Government and Petitioner's other creditors; and attempted to mislead Petitioner until Petitioner's time for filing had expired (R-86-87) and thus bar Petitioner's contemplated suit against the Macris and Continental Casualty Company. After Petitioner retained another attorney (on October 22, 1945) to file suit, and before said suit was filed, the respondents filed a malicious suit (on December

14, 1945) for $40,000.00 against Petitioner resulting in a nominal award of judgment of $1.00 in favor of Petitioner, which has not yet been paid (R. 379-381).

Further, Willard E. Skeel of the McKelvy office represented Continental Casualty Company in the suit Petitioner later filed through another attorney. (The record of all this case is before the Supreme Court of the United States in the case of Schaefer vs Macri et al, No. 791, October term 1948, on Certiorari from the Ninth Circuit Court of Appeals). Skeel was there on February 21, 1947 (R-415 ff) (Note: on February 20, 1947 Petitioner's case in Yakima, Washington was to come to trial, but a few days before the 20th Petitioner's attorney informed him that the case had been set over to the 24th. This was done to afford the respondents an opportunity to make their spurious record without Petitioner finding out about it, and this record of the 21st of February 1947 did not become known by Petitioner until on or about August 19, 1950 while preparing the complaint in this present suit) to make a proper record of a spurious termination agreement between Philp, Goerig and the Macris, and in order to transfer any moneys which the Macris might receive from Philp and Goerig, to a Seattle bank in order to preclude Petitioner from recovering from the Macris, in case Petitioner should fall into their trap by allowing the suit to be called one for damages. Also, should Petitioner allow it to be called damages, the Continental Cas-

ualty Company would not be liable, nor would any other defendant who was solvent. After it was filed, came malicious abuse of judicial processes in which Continental Casualty Company and McKelvy led the way, and the attorneys for Continental were hired and instructed by McKelvy and Skeel; and at the conclusion of the litigation the Continental Casualty Company representatives had to check with McKelvy and get his clearance before the language on the back of the draft could be changed, as demanded by Petitioner, which language, had it not been deleted, might have prevented the filing and prosecution of this present suit; and, finally, McKelvy attempted to get Petitioner blocked out of court by collecting from Petitioner a payment on account to McKelvy in August of 1950, at which time McKelvy admitted that certain of the foregoing statements were true (R. 493-498).

It is interesting to note that Macris are still being bonded by Continental Casualty Company but have not paid the judgment against them in Petitioner's Yakima suit, nor have Philp or Goerig yet paid Continental Casualty Co.

All this and more is briefly set out in Petitioner's original complaint (R. 3 ff) and more fully so in his amended complaint (R. 42 ff) and his second amended complaint (R. 367 ff).

With this brief outline of the basis for the litigation, petitioner now invites this Court's attention to the extremely unusual conduct of this case by

the four District Judges; namely, Judge John C. Bowen of Seattle, Washington; Judge Dal W. Lemmon, of Sacramento, California; Judge Sam M. Driver, of Yakima, Washington; and Judge William C. Lindberg, of Seattle, Washington, who heard the case in the District Court; Justices Homer T. Bone, William Healy and Walter Pope, who heard it on appeal in the Circuit Court of Appeals for the Ninth Circuit, the two court reporters; namely, Messrs. Earl V. Halvorson and Glen W. Walston, and the attorneys for the defendants below, Mr. Granville Egan, Mrs. Altha P. Curry and Mr. Carl E. Croson, all of Seattle, Washington. All of these persons have been guilty of aiding and abetting the original wrong.

When the original complaint was filed, motions were directed against it by the several defendants, to dismiss for failure to state a cause of action and on the grounds the statute of limitations had run.

These motions came on for hearing before Judge John C. Bowen. This Judge fell into the pattern dictated by McKelvy and the other defendants. He stated in practical effect that Petitioner did state a cause of action and that the statute had not run, but, possibly because he was controlled by defendants or intimidated by them, shirked his duty to Petitioner (R. 30 to and incl. 34) to decide the matter, and assigned it to Judge Dal W. Lemmon of Sacramento, California. This action was part and parcel of the basic plan of shifting judges, cluttering the record, delaying and ultimately

throwing Petitioner out of court without a hearing on the merit. Judge Lemmon continued the plan by granting the motions to dismiss after Petitioner had requested permission to file an amended complaint. Even before Petitioner started his argument Petitioner handed some papers to the clerk to be given to the Judge. The clerk looked up at the judge, but getting no sign to hand them up, he returned them to Petitioner at adjournment.

Petitioner did prepare and file an amended complaint and again similar motions were filed on the same grounds. For hearing these motions, Judge Sam M. Driver was imported from Yakima, Washington. Judge Driver stated from the bench that he was formerly associated in McKelvy's office, yet he failed to disqualify himself. (R. 293) as follows:—"Before that it was Skeel & Whitney; I worked there for six months in 1916. Scarcely any member of the bar in the State of Washington hasn't at one time or another. I worked in Skeel & Whitney's office from June to December 1916, the year I graduated from law school."

It is respectfully submitted that the facts as stated by Judge Driver explain why Petitioner has been unable to get any attorney to represent Petitioner because McKelvy is one of the defendants.

That Judge Driver was prejudiced is apparent from the wholly unwarranted outburst from the bench by Judge Driver: "You really think that, huh?" in a surly voice (R. 339), and on the same

page, "I thought it was a hard fought close lawsuit in which I might as well have found against you as for you it was that close. * * * I think perhaps you've come to the realization which many litigants don't that litigation necessarily and unfortunately is expensive and that it isn't as profitable even for the winner as is sometimes thought." Also, at Page 340 of the Record, Judge Driver stated to Petitioner with respect to the prior suit at Yakima—"I didn't think your skirts were any too clean either." This is directly in conflict with the remarks of Judge Driver when he heard the case in Yakima, about which he made the above remarks in this case (R. 438-461).

Further evidence of Judge Driver's prejudice in favor of McKelvy appears at page 343 of the Record where he states: "The fact a busy lawyer in a large firm may have overlooked the fact that he had some conflict of interest there, that is the only thing you've got, as I see it, that wouldn't be in the ordinary course of this kind of a transaction."

At any rate, Judge Driver couldn't go all the way with the pressures being put on him by the firm of Skeel, McKelvy, Henke, Evenson and Uhlmann(with whom he once was associated (R. 293)), and while he granted the motions to dismiss, it was strictly on the grounds of the amended complaint being complex and prolix, not that a cause of action had not been stated, nor that the statute of limitations had run (R. 361-365), nor did he so hold

in the Order of Dismissal (R. 365). Also, Judge Driver, of his own volition, allowed Petitioner 30 days to file an Amended Complaint. This wholly unwarranted and completely false series of statements by Judge Driver was the reason for Petitioner's "Statement re Judge Assignment" (R. 501) requesting a proper caliber Judge to hear the Second Amended Complaint.

Petitioner then filed his second amended complaint and again motions to dismiss were filed and for the same reasons.

This last set of motions was heard by the then newly appointed District Court Judge in Seattle, Judge William J. Lindberg, who Judge Bowen said he felt possessed the qualifications set out in Petitioner's statement (R. 501).

Judge Lindberg heard the case on August 6, 1951, and on the 7th called the parties back to sign the orders. When he convened court on the 7th, with his right elbow on the bench and his hand shifting from his chin to his temple, the judge spoke these words slowly and thoughtfully as though he were thinking aloud and oblivious of our presence: "I believe the Plaintiff has stated a cause of action; and am I to say that the statute of limitations has run?" Mr. Croson, the attorney for Continental Casualty Company, drooped his shoulders, looked amazed at the judge, then turned and looked at his counsel table where attorneys for the other defendants sat, looked at Plaintiff sitting at

his counsel table, looked back at the other attorneys, then back at the judge and said, "Well—your Honor—that's what you said yesterday," (apparently referring to the orders he had handed to Judge Lindberg), and then he started to whisper to the judge. Petitioner got up, went and stood at the end of his Petitioner's table abreast of and within about eight feet of Mr. Croson; and about that time, Croson quit whispering. Plaintiff could not understand a word he said.

Finally Judge Lindberg signed the orders (R. 532), giving no grounds. In his ruling from the bench (R. 635-636) Judge Lindberg stated that he agreed with Judge Lemmon and Judge Driver that no cause of action was stated and that the statute had run— (which neither Judge Lemmon or Judge Driver did). Please read record R. 635 and 636 and see how confused (if not incompetent) Judge Lindberg was.

Judge Lindberg (R. 628) also attempted to cause Petitioner to become in contempt of court by baiting Petitioner. (This record as reported by Mr. Halvorson is not correct). The Judge did ask: "Mr. Schaefer, are you directing criticism at the court?" but Petitioner's reply was: "I am just quoting. I have just quoted what was said here, your Honor."

The reporter who reported the proceedings before Judge Lindberg, Mr. Halvorson, intentionally omitted from the transcript of the record of the proceedings before Judge Lindberg on August 7,

1951, the matter in the third preceding paragraph, and made the foregoing change, other changes, and omissions, such as on Page 628 as reported, "The Court has read that, is it your purpose to attempt to show prejudice of some kind?", and this should read, "Are you claiming prejudice on the part of Judge Driver?", and in Petitioner's answer he omitted, "I am" — this should read, "Yes, I am, your Honor." The Court Reporter, Halvorson, also delayed getting out the transcripts for over 14 days after they were promised. (Affidavit regarding Halvorson's delaying action in getting out the transcripts appears in (R. 548 ff) (Affidavits that there were changes and omissions in Halvorson's transcript appears in the record at page 544-548)). By Petitioner's letters of September 10 and September 21, 1951, Appendix hereto (21 and 22), Petitioner called to Judge Lindberg's attention these defects; and Judge Lindberg did nothing about it. These delays were done to cause Petitioner to forget and not detect the changes.

At this same hearing before Judge Lindberg, Petitioner presented a motion to supplement his complaint by naming as an additional party defendant one B. J. Rask, and making appropriate allegations of his complicity, (R. 516), which motion was denied (R. 534); but by stipulation of counsel the matter contained in Petitioner's motion with respect to Rask's involvement was deemed to be before the Court (R. 561 ff).

Now this Rask, on the pretext of soliciting Petitioner's insurance business, came into Petitioner's office and at once disclosed that he was intimately versed in Petitioner's controversy with respondents, actually threatened Petitioner's life if Petitioner persisted in prosecuting this case; and it now appears most uncanny the way he predicted the course Petitioner's case would take. He predicted that the cards were all stacked; that the judges were the pawns of Continental Casualty Company and the McKelvy office; that Petitioner's case would be shunted from one judge to another and that Petitioner would get nowhere, except to waste time and money, and perhaps his life. (See Petitioner's affidavit of the Rask conversation at page 51-57 Appendix to this brief). Rask has more than nine times since called to remind Petitioner of his impending fate and also has tried to woo Petitioner's key man away to work for one of Rask's colleagues.

While the appeal to the Circuit Court of Appeals was still pending and before briefs were in, one of defendants (Appendix 23) requested that the hearing on appeal be in Seattle. Petitioner then requested (Appendix 23-24) that the hearing be either in Portland or in San Francisco. Before the respondents' briefs were in and before the maximum time for filing briefs would have expired, the clerk set the hearing on the appeal and set it at Seattle (Appendix 24).

On April 9, 1952, these Circuit Judges put themselves in a compromising position by attending a

luncheon which McKelvy either sponsored or in which he played a prominent part. This luncheon occurred during the noon recess of the day Petitioner's appeal was being argued before these judges, and while Petitioner was in the middle of his argument. When their opinion came down (R. 656) it was very succinct — in effect — action sustained.

Also on April 9, there was a Court Reporter present and Petitioner ordered transcripts for his own use, which transcripts were inaccurate, incomplete and not even certified. Affidavit of the dereliction of duty by this reporter, Mr. Glen W. Walston, is in the record at page 106-113 Appendix to this brief.

In addition these attorneys were engaging in reprehensible conduct as follows:

1. Mr. Croson, arguing before the Circuit Judges represented Petitioner's original 8 page complaint to have been 78 pages and repeated it two or three times, and the other counsel for defendants nodded their agreement (Appendix 96, also 109).

2. Mrs. Curry omitted reference to Philp in her so called "analysis" of Petitioner's complaint in the hearing before Judge Bowen and helped Judge Bowen to an excuse for getting out of the case. (R. 15-36).

3. Mr. Egan in open court before Judge Driver (R. 327) represented the Macri's as being financially

broke as the direct result of Petitioner's Yakima suit against them. This is absolutely false. Egan also insinuated, in conversation, following the hearing before Judge Lindberg on August 7, 1951, that Petitioner's life was in jeopardy. (Appendix 71 ff).

SPECIFICATION OF POINTS AND ERRORS TO BE URGED

The Court of Appeals erred:

1. In sustaining the order of the District Court dismissing Petitioner's amended complaint with prejudice for alleged failure to state a cause of action, and by reason of assertedly being barred by the statutes of limitation, and by refusing to grant Petitioner's motion to supplement his complaint by adding B. J. Rask as an additional party defendant.

2. In themselves engaging in highly unusual and irregular course of action and in condoning and approving similar unusual and irregular action by the four district judges, the two court reporters and the attorneys for the defendants, all as more fully set forth in Petitioner's statement next preceding.

REASONS FOR GRANTING THE WRIT

1. The course of conduct of the Circuit and District Judges, reporters and attorneys so far departs from usual and accepted course of judicial proceedings as to call for the exercise of this Court's supervision.

2. The Trial Court and Appellate Court erred in the law, brief of which, by the Petitioner, is set forth in the Appendix hereto at pages 26 to 59, being his original and reply briefs before the Circuit Court of Appeals.

As stated above, Petitioner was unable to get an attorney to represent him in this case because of naming a prominent attorney as defendant. Realizing the innateness of thought, and that if it were not for the invisible means of support from the start of the work near Yakima, Washington in March 1944 to the time of payment of the judgment in the quantum meruit suit in connection with that job in November 1949, Petitioner could not have carried through. Petitioner is giving complete reliance on the Lord as exhorted in Proverbs 1:33 and 3:5 through 7, and is confident that this most high and honorable court of the land will grant this petition for writ of certiorari.

PRAYER

WHEREFORE, your Petitioner prays that a writ of certiorari issue out of and under the Seal of this Court directed to the United States Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court the transcript of the record in the above-entitled cause and all the proceedings in the said United States Court of Appeals, together with the material contained in the Appendix hereof to the end that said cause may

be reviewed and determined by this Court and the judgment or orders of the Circuit Court of Appeals for the Ninth Circuit be reversed and the case remanded for trial on the merit according to law.

M. C. SCHAEFER,
Petitioner, Per Se.

APPENDIX 1

Portland, Oregon
September 10, 1951

The Honorable William J. Lindberg
United States District Judge
United States Court House
Seattle, Washington

Re: Schaefer vs. Macri et al
No. 2673, Civil

Dear Judge Lindberg:

This will acknowledge your letter of September 4th, 1951, by which you transmitted new form of certification by the reporter who transcribed the proceedings in the above case had before your Honor on August 6th and August 7th, 1951.

It would now be in order for the reporter to furnish me for use in the appeal from your Order, three copies of transcript which conform to the certificate. It is apparent from even casual reading of the copies previously supplied that they are not full, complete and accurate.

Very truly yours,

s/ M. C. SCHAEFER.

lbd
Registered Mail
Return Receipt

APPENDIX 2

September 21, 1951

William J. Lindberg
Judge, U. S. District Court
United States Court House
Seattle, Washington

Re: Schaefer vs. Macri, et al;
No. 2673 Civil

Dear Sir:

By my registered letter to you dated September 10, 1951 I brought to your attention the fact that the transcript of the hearings on August 6 and August 7, 1951 before you in the above case were inaccurate and asked that you have the reporter prepare a correct set.

I received a letter dated September 13, 1951 from the reporter stating that you had turned my letter over to him for further handling and also stating that the transcript was full, complete and accurate, but if I didn't think so to cite lines and pages I felt were wrong.

This is to advise that I am preparing Affidavits for execution by parties conversant with the facts to the effect that the transcript supplied me is inaccurate and will file the same and ask that they be made part of the record on appeal.

Very truly yours,

s/ M. C. SCHAEFER.

MCS:gt

APPENDIX 3

February 13, 1952

Willard Hatch, Esq.
Attorney at Law
900-906 Insurance Building
Seattle 4, Washington

No. 13129
M. C. Schaefer vs. Sam Macri, et al

Dear Mr. Hatch:

I have your favor dated the 12th instant, enclosing request for hearing of above cause in Seattle, Washington. The request has been filed and noted.

Sincerely,
PAUL P. O'BRIEN, *Clerk.*

O'B:C
cc-all counsel.

APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 13129

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation,

Appellees.

REQUEST FOR HEARING IN PORTLAND, OREGON

M. C. Schaefer, appellant herein, herewith respectfully requests in accordance with Rules 3 and

4 of this Court that the above appeal be heard at Portland, Oregon, at the earliest possible regular session here.

This request is based on the fact that appellant has now been required to make six trips to hearings in Seattle on account of the venue statutes. This hearing should therefore equitably be here.

Should the Court see fit to make a special setting, I request Portland for the above reasons; but if the Court sees fit to deny this request, then I urge that the hearing be in San Francisco, where all litigants will be on neutral ground.

s/ M. C. SCHAEFER.

APPENDIX 5

March 5, 1952

Mr. M. C. Schaefer
3535 E. Burnside Street
Portland 15, Oregon

Dear Sir:

Your case, No. 13129, Schaefer vs. Macri, et al, has been definitely assigned for hearing on April 9, 1952 at 10:00 o'clock a.m. in the Courtroom of the United States Circuit Court of Appeals for the Ninth Circuit, on the eighth floor of the United States Courthouse, Fifth and Sixth Avenues, Spring and Madison Streets, in the City of Seattle, in the State of Washington.

Very truly yours,

PAUL P. O'BRIEN, *Clerk.*

APPENDIX 6

BRIEF OF APPELLANT SCHAEFER

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No. 13129

United States

COURT OF APPEALS

for the Ninth Circuit

•

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation,

Appellees.

•

BRIEF OF APPELLANT SCHAEFER

•

Upon Appeal from the United States District Court,
Western District of Washington,
Northern Division.

JURISDICTION

This is an action by appellant herein against appellees herein alleging damages to appellant by reason of a conspiracy among appellees to damage appellant.

[2]

The action was instituted in the United States District Court for the Western District of Washington at Seattle, Washington, and as alleged in appellant's Second Amended Complaint (page 367 of printed Transcript of Record) trial court jurisdiction is based on diversity of citizenship and amount

in controversy under Title 28, United States Code, Sec. 1332.

Appellate Court jurisdiction is based upon usual appellate jurisdiction of this court from final orders and judgments in actions at law or suits in equity. Final order dismissing appellant's Second Amended Complaint was entered in the trial court on August 7, 1951 (page 532 of Transcript of Record), and notice of appeal therefrom was filed on September 4, 1951, was designated in Appellant's Designation of Contents of Record on Appeal (pp. 537-538, Transcript of Record), item 21, as one of the documents to be included in the record on appeal and was Certified by Clerk of the trial Court (pages 645 and 652, Transcript of Record) under item No. 82 as part of the record transmitted to the Appellate Court, but through a printing error was not included in the printed copies of Transcript of Record in this Appeal.

STATEMENT OF THE CASE

The sole questions involved in this appeal are:

1. Does the complaint, as amended, state a cause of action?

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2. If so, is the action barred by reason of the statute of limitations?

3. Should the Court have granted plaintiff's motion (page 516, Transcript of Record) to file a Supplemental Complaint.

These first two questions are raised in the pleadings in the following manner: The complaint was filed and motions were directed against the complaint on the above points by the several defendants, each appearing separately. At the hearing on these motions, which were consolidated for hearing at one time, appellant herein requested and was granted permission to file an amended complaint.

To the amended complaint similar motions were directed, and the trial judge granted the motions, with leave to appellant herein to file a second amended complaint.

This was done (page 367 of record on appeal) and again similar motions were filed (pages 499 to 503 inc., of Transcript of Record) and the trial judge again signed an order dismissing the second amended complaint (page 532 of Transcript of Record) on the above grounds, but without leave to file a further amended pleading. These orders were therefore a final determination by the trial court and this appeal is taken to determine the propriety of such orders dismissing the second amended complaint.

The third question arose as follows: Shortly prior to the hearings on August 6 and 7, 1951 on the

several Motions to Dismiss directed to the Second Amended Complaint, plaintiff below discovered some strong evidence as to the further involvement of defendant McKelvy with the other defendants.

Plaintiff then prepared and filed on 8/6/51 his motion for an Order permitting him to supplement his complaint by adding appropriate allegations as to said defendant McKelvy. Plaintiff also sought permission to supplement the complaint by adding allegations, adding one, B. J. Rask, as a party defendant and alleging certain threats and coercion practiced by him.

At the said hearing on 8/6/51 it was stipulated by all parties that despite lack of proper verification and supporting affidavits the facts set forth in said Motion by plaintiff might be considered by the Court in passing on defendant's Motions for Dismissal.

The Order of Dismissal (page 532, Transcript of Record) recites this stipulation, but the Court, having first found that the Motions to Dismiss should be granted, then cleared the record by denying plaintiff's Motion to file Supplemental Complaint. Should the appellate court reverse the trial court, then the Motion to File Supplemental Complaint should also be granted.

SPECIFICATION OF ERRORS

The District Court erred:

1. In granting the motions of the several defendants who appeared, to dismiss the complaint

as amended on the grounds that it failed to state a cause of action and that the statute of limitations

had run, in that it does state a sufficient cause of action and the statute had not run.

2. In denying plaintiff's Motion for Order Permitting Filing of Supplemental Complaint.

ARGUMENT

1. *Summary of Argument.* Appellant's principal contentions may be briefly summarized as follows:

a. The second amended complaint does allege a cause of action for damages by reason of overt acts of the defendants pursuant to a preconceived concerted plan to damage plaintiff and appellant, all as more fully set forth in the Argument.

b. The statute of limitations begins to run from the last overt act; and these last acts were within the statutory period, hence the statute does not run for this action.

c. The material set forth in the Motion for Order Permitting Filing of Supplemental Complaint, having been stipulated as admissible, the motion should be granted if there is a reversal of the trial court's ruling.

2. *Conspiracy—Allegations to Sustain Same.* As a practical matter, little argument is required on the question of whether or not a cause of action is stated. Careful reading of the complaint, in the light of the rules of construction laid down in *Jefferson Hotel vs. Jefferson Standard Life Insurance*

Co., 7 F.R.D. 722; *Terteling vs. P.U.D.*, 8 F.R.D. 210; *Kansas Gas vs. Hastings*, 10 F.R.D. 280, should suffice. In addition, however, appellant cites the further law as follows:

> "Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than the conspiracy itself. . . . The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable. The combination must be shown, however, if, because of a dishonest combination to accomplish some wrongful act the conduct complained of becomes actionable. The essential elements of a criminal or 'civil' conspiracy are the same, except that to sustain a civil action for conspiracy special damages must be proved." (11 Am. Jur., Conspiracy, Sec. 45, pages 577 and 578.)

To the same effect see also: *Calcut vs. Gerig* (CCA 6th), 271 F. 220, 27 A.L.R. 543.

It is not necessary in order to establish that the defendants are co-conspirators, to prove that the conspiracy originated with them or that they met during the process of the concoction of the scheme. (11 Am. Jur., Conspiracy, Sec. 48.)

In *Lyle vs. Haskins*, 168 P. 2d 797, the Supreme Court of the State of Washington held that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required and that

direct and positive allegation and proof is not required.

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Attention is also respectfully drawn to the many authorities cited in Vol. 3, A.L.R., Permanent Index covering Volumes 1-175, Conspiracy, Sec. 1, pages 75 and 76.

Looking now at the Second Amended Complaint:

Appellant herein alleged in Par. VI (page 370, Transcript of Record):

> "That defendants and each of them willfully, maliciously and with deliberate intent to injure, damage and defraud plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part of the following:"

Then followed a series of sub-paragraphs in which plaintiff below alleged the principal acts committed by defendants below in furtherance of said conspiracy, which, for convenience, are briefly summarized, but can be read in full beginning at page 370 of the Transcript of Record.

A. That the defendants Macri intentionally delayed performance and performed in a faulty manner their obligations under the contract between plaintiff and said defendants Macri, all for the pur-
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pose of and in fact causing plaintiff greatly increased cost and unnecessary delay and that the acts of said Macris were joined in by the defendants Philp and Goerig who were silent partners of defendants Macri (but this latter fact was not then known to plaintiff).

B. That on or about July 15, 1944, defendants Macri and defendants Philp and Goerig entered into a fictitious agreement purportedly terminating their joint venture, for the sole purpose of confusing the facts and attempting to deprive plaintiff of a cause of suit against defendants Philp and Goerig.

C. and D. That on or about November 1, 1944, defendant McKelvy became a co-conspirator with the other defendants in that said McKelvy accepted employment by plaintiff below to terminate the contract between plaintiff and said Macris and sue for the reasonable value of the work done, but in fact said McKelvy, after learning all facts about plaintiff below, worked closely with the other defendants (who, unknown to plaintiff, were clients of said McKelvy) and by every possible device (the details of which are set forth) attempted to accomplish the aforesaid ends of said conspiracy and almost succeeded.

F. and G. That just before suit was filed as alleged in sub-paragraph E, defendants caused a suit to be filed in Multnomah County, Oregon, against plaintiff for the sole purpose of tying up his credit and making it financially impossible to prosecute the proposed suit, which did dry up plaintiff's credit, and only by the grace of God and the ex-

[9]

treme tenacity of plaintiff was he able to prosecute his first suit against the Macris and the Continental Casualty Company.

H. Paragraph H goes into great detail to show that the defendants in said first suit abused the judicial processes for the purpose of furtherance of said conspiracy to bankrupt plaintiff and ruin his reputation and credit.

I. Shows how the defendants by crafty language on the draft in settlement of the judgment plaintiff obtained in his first suit attempted to block filing of this suit.

J. Shows how defendant McKelvy attempted to get plaintiff to pay McKelvy a fee for alleged services rendered by McKelvy to plaintiff for the purpose of precluding plaintiff from filing this action.

In Par. VII, plaintiff alleges he suffered special damages by reason of the aforesaid conspiracy and acts done in furtherance thereof.

The web of intrigue, conflicting interests, breaches of trust, intentional misadvice and clearly interrelated activities of all the parties defendant

as thus set forth in the complaint are relied on by appellant herein as a sufficient allegation, especially in the light of *Lyle vs. Hoskins,* supra, to state a cause of action for damages by reason of conspiracy between the defendants and acts done in furtherance thereof.

By stipulation (see Order, page 532 of Transcript of Record) it is admitted for the purpose of the Motion to Dismiss that threats were made on

[10]

plaintiff and intimidation practiced by one, B. J. Rask, in March, 1951, thereby adding to plaintiff's case something more than abuse of litigation and subtle maneuvering by McKelvy.

3. *Statute of Limitations.* State rules as to limitations of action will be applied by the Federal Courts in cases where jurisdiction is based on the diversity of citizenship and amount in controversy. *Moffet vs. Commerce Trust Co.,* 75 F. Supp. 303.

No ruling can be found wherein the Supreme Court of the State of Washington has ruled whether the two-year or the three-year statute of Washington applies to a civil conspiracy action. The matter appears to be one of first instance for this Court to determine.

In any event whether the two or the three year statute applies this action is not barred by the running of the statute of limitations as there were overt acts performed within a few months of the filing of plaintiff's original complaint.

For an exhaustive annotation on the subject of the running of the statute of limitations, see 97 A.L.R. 137, 152, citing numerous decisions of Federal Courts and state courts. The majority rule seems clearly to be that a conspiracy is a continuing offense and the statute does not start to run until the last of the overt acts done in furtherance thereof. This view has been adhered to in this case by Judge Lemmon, see page 259 last paragraph, Transcript of Record.

4. *Motion to File Supplemental Complaint Should Be Allowed.* The material set forth in plaintiff's Motion for Order Permitting Filing of Supplemental Complaint, having been stipulated by all parties as being before the trial court, should be deemed part of the record and if there is an order entered herein reversing the trial court, then the said motion of plaintiff should be allowed, as the material is of vital significance and has a bearing not only on the matter of conspiracy but also on the Statute of Limitations.

[11]

5. *General.* For a proper understanding of this case, appellant respectfully submits that a brief review of the record is needed.

The original complaint (page 3, Transcript of Record) was 8 pages long and at the hearing on the motions of the several defendants to dismiss for failure to state a cause of action and on the grounds that the statute of limitations had run,

Judge Bowen presided at the beginning of the hearing. It is quite apparent that he believed a cause of action was stated and that the statute had not run. Attention is respectfully directed to the remarks made by Judge Bowen particularly on page 33, Transcript of Record, where the Judge stated: "My thought is that in view of the facts that it promises to be lengthy in respect to the further arguments and I do not know how long my cold is going to last, I am inclined to feel for that reason that I should ask Judge Lemmon to hear the case. . . ."

Mrs. Curry then asked, "Your Honor means by 'the case' the motion?"

To which Judge Bowen replied, *"I mean the whole case."* (Italics supplied.)

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The case was then assigned to Judge Lemmon and from the Transcript of Hearing before Judge Lemmon it is clear that this Judge ruled only that the pleadings were not phrased with the nicety he required and voluminous suggestions were made to help plaintiff reallege his case in a manner sufficient to overcome a motion to dismiss. Thus while the Order of Dismissal was unequivocal, the transcript shows that it in fact was conditional and plaintiff was given leave to amend.

In the opinion by Judge Driver at the conclusion of the hearings on defendants' motion to dismiss the amended complaint (page 361, Transcript of

Record, and following) it is again made abundantly clear that the fault lay only in lack of nicety of language, not in lack of merit, and again leave was granted to file a further amended complaint and suggestions were given as to ways in which the material set forth could be rephrased so as to meet the requirements of pleading at least sufficiently to get past a motion to dismiss.

Second Amended Complaint was filed (page 367, Transcript of Record) and Judge Lindberg in his ruling from the bench (page 635, lines 14 ff., Transcript of Record) that the second amended complaint failed to cure the defects pointed out by Judges Lemmon and Driver but gave no reasons for his ruling.

Attention is respectfully drawn to the statements made and the authorities cited by Judge Driver in his opinion in the second full paragraph, page 363, Transcript of Record, to the effect that in passing on a motion to dismiss the complaint should be

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construed in the light most favorable to plaintiff and *the motion should not be granted unless under no conceivable factual situation which might be established within the framework of the complaint could any relief be granted to the plaintiff.*

Appellant respectfully submits that while the second amended complaint may not have been worded with the nicety of a Blackstone, it certainly meets the tests of the authorities cited by Judge

Driver and this Court should reverse the trial court and permit plaintiff to have his day in court in accordance with those fundamental principles upon which this nation was founded and adherence to which has made it the greatest nation on the face of the earth.

s/ M. C. SCHAEFER.

APPENDIX 7

REPLY BRIEF OF APPELLANT M. C. SCHAEFER

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No. 13129

United States
COURT OF APPEALS
for the Ninth Circuit

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation,

Appellees.

REPLY BRIEF OF APPELLANT M. C. SCHAEFER

Replying to Briefs of Appellees:
W. R. McKelvy,
Continental Casualty Company,
Sam Macri, Don Macri and Joe Macri.

ARGUMENT

First, let me congratulate counsel for the Defendants. They have so skillfully handled what little they have had to work with that their briefs standing alone might be persuasive to persons not familiar with the facts. Hence, I again urge that this court *read all of the transcript carefully!*

Next, let me show in plain, simple language of a layman just what happened.

[2]

My story begins early in 1944. At that time defendant W. R. McKelvy, a prominent Seattle attor-

ney, represented defendant Continental Casualty Company. As a matter of fact, so did Willard Skeel and other members of the firm of Skeel, McKelvy, Henke, Evanson & Uhlmann. This firm had been general counsel in Washington for Continental Casualty Company for years before and still is.

Sam Macri, Don Macri and Joe Macri were partners, with Sam Macri the head of the firm. They had a large volume of contracts with the Government and with the State of Washington and now manage three or four companies doing a huge volume of business. But the head of the Macri Organization I dealt with, Sam Macri, during the time I was involved with them, while testifying under oath that he personally figured the job of which I had taken a part, and had been in the construction business 26 years, *could not even read the simplest figures* on a plan (See Transcript of Testimony in case No. 11707 — Circuit Court of Appeals — Ninth Circuit, Pages 1422 ff. and 1656 ff.). Yet, despite the complete lack of qualification of the Macris to engage in any kind of construction work, Continental Casualty Company in all Macris' deals issued bonds guaranteeing their performance and payments. Why? Were the Macris merely fronting for Continental Casualty Company or McKelvy and Skeel? Then in addition we find Clyde Philp, attorney-in-fact for Continental Casualty Company, who is a partner with one Goerig, and the two are silent joint venturers with the Macris on the jobs I was in-

volved with and many others before and after. Note that Philp by reason of his position as attorney-in-
[3]
fact knows or can determine amounts of other bids being submitted and can therefore tip off someone fronting for him and others as to what figures to bid without doing any estimating of their own.

While it does not directly concern this case, the combination of persons outlined above existed for some time before I got innocently involved with them. This group has a reputation among others who have dealt with them that the things they did to me were part of a consistent pattern of what they do to others who come in touch with them.

Such was the basic set-up when I came into the picture by taking a subcontract with the Macris early in 1944, although I didn't learn of it until later on.

I think and have tried to show that all this is wrong to allow an attorney to mishandle the trust and confidence of his clients and in conspiracy with a bonding company and a pseudo-contractor as a front and in partners with the attorney-in-fact for the bonding company, who is in a strategic position to know other prospective bidders' figures, try to drive legitimate contractors into slavery to them or else by every means at their command including threats of physical violence and intimidation try to drive them out of business. This is wrong not only in its immediate and direct effect on the

parties involved but also wrong to permit it to continue and possibly spread elsewhere throughout the world where weak and short-sighted men may be found who are willing to yield. I refuse to yield. With truth and confidence in Christ there is no

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excuse for accepting the intimidations of a power having existence only in mortal belief. I am subordinate to no circumstances and to no person—only to the one true power and being eternal, God.

To continue my narrative, watch how the pattern of intrigue unfolds!

First, the Macris failed to do their preliminary work timely or properly and failed to supply proper or adequate quantities of material causing me extra cost and delay. Then they failed to pay me even the basic amounts required under my contract. The financial aspect was getting serious after several months of this.

Then I began to hear stories from others who had been similarly treated by the Macris. Becoming concerned, I sought from W. R. McKelvy what I thought was competent legal help to (1) terminate the one contract I was then working on and attain the reasonable value of the work done to date, and (2) to terminate a second subcontract with the Macris, work on which had not commenced.

So, I unwittingly walked into Mr. McKelvy's office. I told McKelvy everything—my finances, my problems, the parties involved, namely (so far as I

then knew), Continental Casualty Company and the Macris, and what I wanted done. McKelvy accepted this employment, assured me my desired results would be obtained, possibly by negotiation between him and one Tom Holman, an attorney formerly associated with McKelvy's office and with whom McKelvy claimed to have a very close relationship and who McKelvy said represented the

[5]

Macris. Mr. Skeel, Sr., sat in on part of this conference. In the transcript (pp. 407-410) you will note that by interoffice memo prepared shortly after I retained McKelvy, he and one of the men in his office confirmed that a cause of action existed and indicated what the grounds and procedure were. It is interesting to note that this memo was inadvertently handed to me by McKelvy when I called his hand in October of '45 and he was so shaken and upset he was not aware he was giving me this item when he turned my files back to me.

But to continue my story with McKelvy, first he dragged me on for some time on the excuse he was negotiating with Macris' attorney; then he told me that by reason of a strictly phony, put-up job involving the son of one of the Macris (who had been arrested for embezzlement), the assets of the Macris had all been safely hidden and that chances of my prevailing in a suit against Continental Casualty were slim. In the meanwhile he kept promising me that suit was being prepared by his office and would soon be ready to file. McKelvy later suggested that

I convey all my property to my brother or someone I could trust and beat my creditors. He told me at the time about a similar maneuver by another contractor resulting in beating a bank out of $83,000 and that he, McKelvy, was able to get the contractor cleared. I refused to engage in this fraud.

A few days thereafter McKelvy failed to keep an appointment with me; and was so obviously stringing me on that I walked into his office unannounced on October 20, 1945, for a showdown.

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McKelvy then told me he couldn't file suit against Continental Casualty Company as they were one of his firm's biggest accounts, and in response to my question: "How much time do I yet have?", stated that I had only about a month in which to file. He then handed back my file and because of his being so unnerved also gave me part of his file. McKelvy thus attempted to string me on till I was barred by the statute of limitations or by committing a fraud.

I did thereafter retain another attorney who first notified the Macris that suit would be filed on a day certain if my claim was not previously paid. The day before the deadline given the Macris a purely fictitious suit was filed by the Macris against me in Portland on the second subcontract mentioned above. I assert that this second subcontract was intentionally left open to give the several defendants herein one more chance to snow me under financially. A letter was supposedly written by

McKelvy for the purpose of terminating this second subcontract (see p. 411 Transcript of Record) but his firm denied it was sent and Macris denied receiving it.

This Portland suit was, after much expense and bother to me, set forth in my Yakima suit as a counter claim and on the hearing before Judge Driver was summarily dismissed and judgment was given to me for $1.00—incidentally not yet paid. I was in such a precarious financial condition that even another straw could break me, and the defendants no doubt intentionally saved this one item thinking it would be that straw. By almost superhuman effort I kept it from being so.

[7]

Then followed the litigation. First, Continental Casualty Company itself informed my attorney in Yakima of the involvement of Philp and and Goerig and asked me to amend and name them as additional defendants, assuring me that Philp and Goerig were financially very well off and that I could probably collect any judgment from them. Yet Continental Casualty Company knew then that a year and a half before Macris and Philp and Goerig had terminated their joint venture and were not liable to me. Continental Casualty Company and McKelvy also tried by subtle suggestion to get me to sue in damages for breach of contract, knowing if I did that Continental Casualty Company would be relieved under its bond; that Philp and Goerig were released by reason of an alleged ter-

mination agreement with the Macris and that the Macris would be relieved by reason of hiding their assets and assigning to a bank the only assets subject to execution. Fortunately, I forestalled that maneuver by suing in quantum meruit (contrary to suggestion of my attorney). After judgment in my favor in the trial court at Yakima against Continental Casualty Company and Macris (the trial Judge holding that as to me, Philp and Goerig were out by reason of the termination agreement) came a most flagrant and wilful abuse of the judicial processes. The time for appeal by the defendants Macris expired with no action having been taken by them, but Continental Casualty Company filed a separate appeal timely, hence the Circuit Court of Appeals then permitted the Macris to file anyway. All the way through this whole course of litigation it was the Continental Casualty Company *which*

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led the way, and every conceivable device to cause me delay and added cost was used by the Continental Casualty Company and their co-conspirators; and even when the time came finally to pay the judgment the attorneys of Continental Casualty Company had to get McKelvy's approval to delete certain words from the release language on the back of the draft. It is interesting to note the claim by Macris' attorney that I broke the Macris as a result of this judgment. The judgment against them, and also against Philp and Goerig, in favor of Continental Casualty Company has never been

paid and the Macris now head and operate several firms doing a large volume of business; and Philp is still engaged in construction work; and Continental Casualty Company is still bonding the Macris. Abuse of legal proceedings is actionable as conspiracy. See 11 Am. Jur., p. 584, Sec. 52, and cases therein cited.

Always running through this is the obvious thinking of the Defendants that at any one of the steps they might succeed in killing me off because I might not be able financially to follow through.

And speaking of killing me off, I have been personally threatened by a B. J. Rask if I persist in this suit. He is indirectly associated with the Macris and could have entered the picture to attempt to intimidate me only by reason of concert with the other Defendants. The attorney for the Macris at the last hearing in Seattle made similar intimidating remarks and hints of foul play. Following is a verbatim copy of affidavit I recently filed in this court which includes the conversation between Rask and myself:

[9]

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

M. C. SCHAEFER, an individual,
Appellant,
vs.
SAM MACRI, DON MACRI,

No. 13129
AFFIDAVIT

JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellees.

STATE OF OREGON)
) ss.
County of Multnomah)

I, M. C. SCHAEFER, being first duly sworn on oath, depose and say:

That I am the Appellant in this case and the Plaintiff below.

That all matters stated in this Affidavit are true as I verily believe.

That all matters stated in the Motion for Order Permitting Filing of Supplemental Complaint heretofore filed in the District Court in Seattle, Washington on August 6, 1951 appear in the Transcript of Record on pages 516 to 518.

That the facts set forth in the above Motion for Order Permitting Filing of Supplemental Complaint wherein W. R. McKelvy is shown representing the Macris and Continental Casualty Company in the Superior Court, King County, Washington first became known by me on June 25 and 26, 1951, at

[10]

which time I checked the records in the Clerk's office of said Court.

That the following is a copy of a memorandum made immediately after Mr. B. J. Rask left my office on or about March 8, 1951.

"B. J. Rask came to our office (Concrete Construction Co.) in Portland a couple of times and asked for me, but I was not in. He also phoned in a number of times and asked for me, but the bookkeeper told him I was not in and suggested that he talk to Mr. Wheeler, so, after not being able to contact me for a number of times, he talked to Mr. Wheeler about wanting to handle our insurance and bonding business, saying that he could do us a lot of good and would like right then to come and talk it over, but Mr. Wheeler told him he had an appointment out of the office and that our outfit would not be in a position for a couple of months where we could go into general contracting. This man said, 'I'll call again in a few days'. So, he again called and told Mr. Wheeler that he was looking for organizations like ours that knew what they were doing and could perhaps help us to the needed money; that he wanted to come over and discuss the matter.

"They then set a time for March 8, 1951, at which time I was present. As this man came into the rear office with Mr. Wheeler, I greeted him and he pulled up a high stool and, pointing to the swivel chair and an ordinary chair, said, 'I'll take this; I always like to look down on my victim'. Mr. Wheeler told this man that we had carried our insurance and bonding business with the same outfit for a long time and that we were not in a financial position to get into general contracting; that a couple of contractors wanted us to join up with them, but we could not add much to the bonding capacity of

such an organization in view of the pending lawsuit. This man then said, 'Why, you have the equipment and organization that surely would help on that'. Mr. Wheeler said, 'But Mr. Schaefer wants to keep the equipment and

property clear, at least until the suit is settled'. This man then turned to me and said, 'I think you should go up to see these fellows (Defendants below) and settle this out of court. Take what they give you and go on with your contracting business'. I said, 'I'm not contacting them. They know where I am. If they want to settle this thing, I'm agreeable to a settlement, but it will have to be substantial in amount.' He said, 'They will not contact you. You can see why. If you want to tell me, I'll see what I can do on it'. I said, 'No, we'll just let it ride as is'. He said, 'You can't win in a thing like this. The big boys have got this all buttoned up. They control the attorneys and the judges. Who do you think appoints the judges? The big money fellows do, of course.' He then told of a suit he was involved in in Montana and said, 'We had a solid case, but the copper companies had the Governor and all the judges in their back pocket. There are just so many technicalities that a layman can't hope to stand a chance. We didn't, and we had good attorneys on the job. The court will delay, they will switch judges and just anything. These judges are human like everybody else. They are bought off. They are appointed to a life job, but the fellows that get them appointed can depend on them to decide in their favor and they had better decide it as they are told. The little fellow just hasn't got a chance.' I said, 'Well, I don't know about that'. He said, 'They confuse the thing and drag it out for years and they will drag you through the mud so you will look like a criminal. Your reputation will be shot. They will dig up all of your past and, boy, you will just get worn out. It'll take years and you won't get anything out of it then.' I said, 'They can dig all they want to. I'm not afraid of anything

like that.' He said, 'They will lie about you.

You just can't get away from it. They just tell the judge what to do and he does it and if he doesn't want to, they will switch around until they get one that will. You just can't win. All these judges can be reached and the big boys have got the money. You'll be smeared, discredited and broke. The papers won't carry your story, but they will print any smear the other fellow wants to put out.' I said, 'I don't know about that. The Federal Judges have a life job. They don't need the money. Their job is based on honor. I think the wheels of justice will always grind exceedingly fine and things will work out O. K. in the end.' He said, 'You will never get anything like you expect out of it anyway'. I said, I think I will. That Yakima suit has cost me more than $46,000.00 out of pocket money, plus the loss of money for all the years that we should have been in the general contracting business. My line, in the first place, is general contracting. Then I have four inventions that ought to be on the market right now and should have been for a number of years and I should be working on an automatic reader and a number of other inventions and some of these and perhaps including the automatic reader should be on the market now. It will take about $60,000.00 to put the drill-in-tie on the market and at least another $35,000.00 to develop the automatic reader. The other three inventions that should have been on the market a long time are a saw, a hammer and a drill-in-bolt. Those items do not require much money to get them onto the market, but I have not been able to raise enough money to get them through the patent office sooner. If they haven't damaged me to the extent of my claim, they haven't damaged me a dime.' He said, 'If I were you, I'd go up there and take what they gave me and come back and go to work. I wouldn't get too tough

about this thing. I'd think of myself first and if you don't care, then I'd think of my family if I were you. Think it over'."

[13]

That Mr. B. J. Rask has phoned my office more than nine times since March 8, 1951 and by very subtle language has reminded me of the impending fate if I persist in my present course. Mr. B. J. Rask has by flattery tried to induce Gale G. Wheeler to leave Concrete Construction Co. and go to work for Bitar Brothers (Empire Construction Co.) who I am informed and on information and belief allege are relatives of Mr. Rask and also very good friends of the Macris. Mr. B. J. Rask has also stated by phone to Gale G. Wheeler (to which conversation I was listening in on another phone, unknown to Rask) that the Macris are now big operators, and that they are now operating three or four different companies.

That I have made statements in the complaints and hearings to the effect that I have suffered serious monetary damage in the preparation and conduct of the litigation at Yakima, Washington, more fully set forth in the complaint herein, and that it has cost me in excess of $46,000.00 to prosecute that suit, for which I have not received any reimbursement, and I now state that Mr. L. R. Hendershott, a Certified Public Accountant, who testified to the accounts in the Yakima case, has offered to testify to the amount of this damage. The judgment for $1.00 rendered in my favor in connection with job specification #1068, which is the job in connection

with which the malicious suit was filed against me in Portland, Oregon, has not been paid (see Exhibit N, page 463 of Transcript of Record, second paragraph).

M. C. SCHAEFER.

[14]

SUBSCRIBED and sworn to before me this 1st day of March, 1952.

GOLDADA W. TOOKE,
Notary Public for Oregon.
My Commission expires: 6/11/54.

To help you visualize the story outlined above and pleaded in my complaints, I have prepared a sketch graphically portraying the interlocking interests and the various actions of the parties. Copy of this graph is attached and by this reference made a part.

My damages briefly are the extra non-taxable costs in my Yakima suit, the costs of the defense of the wholly groundless suit in Portland, mental anguish as extreme, excruciating and protracted as can be imagined, plus loss of income from my concrete business (I was forced to rely on the personal credit of one of my employees in the amount of $500.00 in order to exist at all), loss of income from being unable during all this period to pursue my regular business, that of being a general contractor in which field I can show earnings of very substantial amounts, and loss of income from being unable to perfect and market certain new inventions I have

now patented, or on which I have patents pending.

Answering Continental Casualty Company's brief specifically so far as I read it, they say only two things, (1) that they merely appealed a close case in the usual course of business, and (2) that everything prior to the case at Yakima was only

[15]

the act of an employee or agent and the Corporation is not liable for acts of the agent.

A corporation can be held liable for damages in conspiracy on account of acts of its agents or employees. See 47 Am. Jur., p. 579, and Hindman v. Bank (CCA 6th) 98 F. 562; 139 Ind. 545; 194 Mass. 208; 50 W. Va. 611; 103 Wis. 125 and 17 Anno. Cases 102; 194 Mass. 208; 220 Ill. 355; 213 F. 526; 117 Tenn. 618; 27 R. I. 254; 79 N.W. 229; 33 A.L.R. 272; 4 B.R.C. 246. Furthermore see Rich v. Daily Creamery Co., 296 Mich. 270, 296 N.W. 253; 134 A.L.R. 252, holding a corporation liable in civil conspiracy and setting up clear tests of the sufficiency of a pleading in conspiracy.

Neither McKelvy's nor the Macris' brief requires specific answer.

In general, the hearings to date and the briefs by Defendants talk about everything except this case. These Defendants misquote and misstate the facts and give a wholly erroneous picture of what happened. There is only one way to determine the merit of my appeal; i.e., after reading this reply brief, then read my complaints.

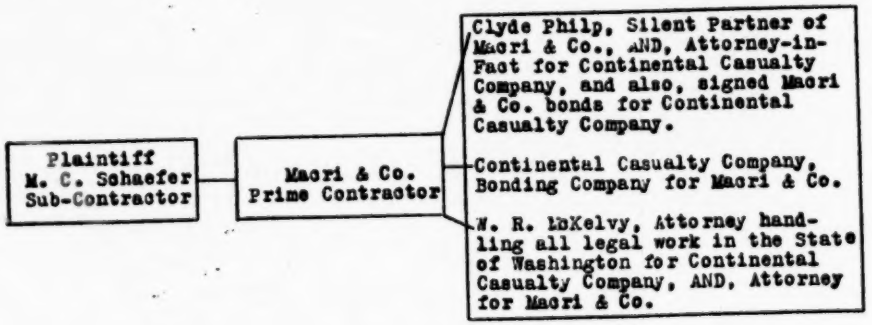
I propose to go more deeply into this matter at the hearing on April 9, unless you are fully satisfied from your reading of the record, but bear in mind that the principal actors in this drama are Continental Casualty Company and McKelvy & Skeel, using their confidential information and their high position for personal gain through such willing participants, though generally incompetent, as the Macris et al., and using every device legal or extra-

legal to crush legitimate operators if they cannot succeed in debasing them.

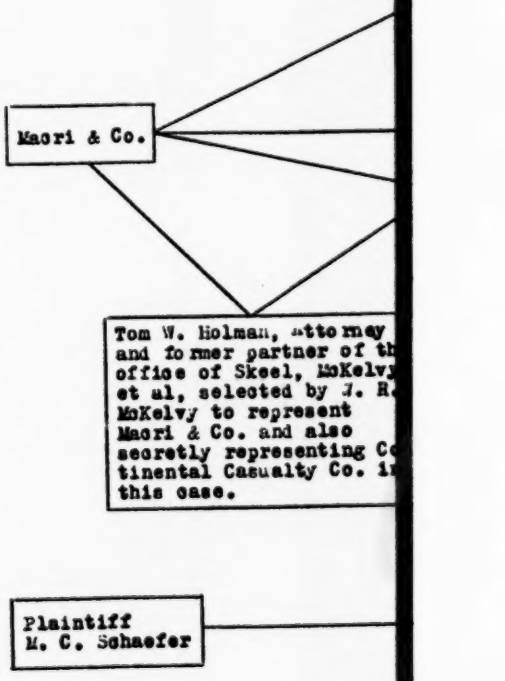
Respectfully submitted,

M. C. SCHAEFER, *Per Se.*

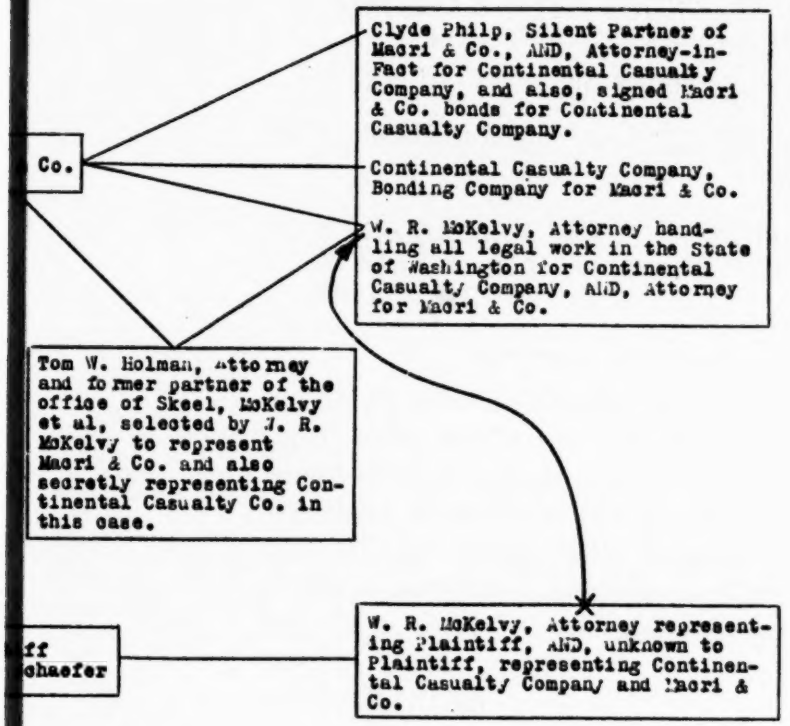
Before Plaintiff M. C. Schaefer retained W. R. McKelvey of the law firm of Skeel, McKelvy, Henke, Evenson, and Uhlmann, the organization was as follows.



Plaintiff retained W. R. McKelvy
Henke, Evenson, and Uhlmann on l
Macri & Co., and Continental Cas
ization was as follows.

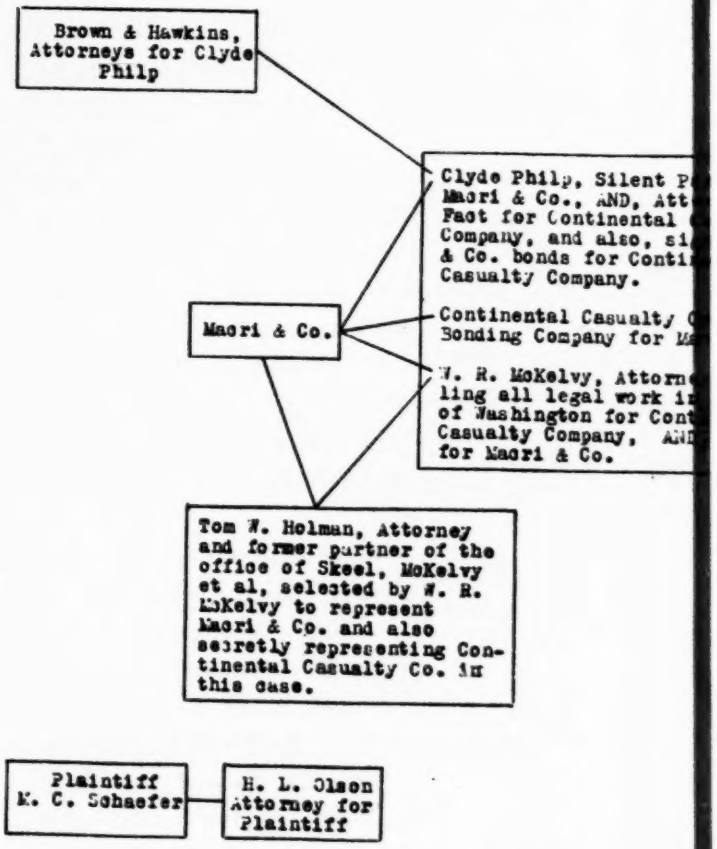


ff retained W. R. McKelvy of the law firm of Skeel, McKelvy, Evenson, and Uhlmann on 11-1-1944 to file suit against Co., and Continental Casualty Company after which the organ- was as follows.

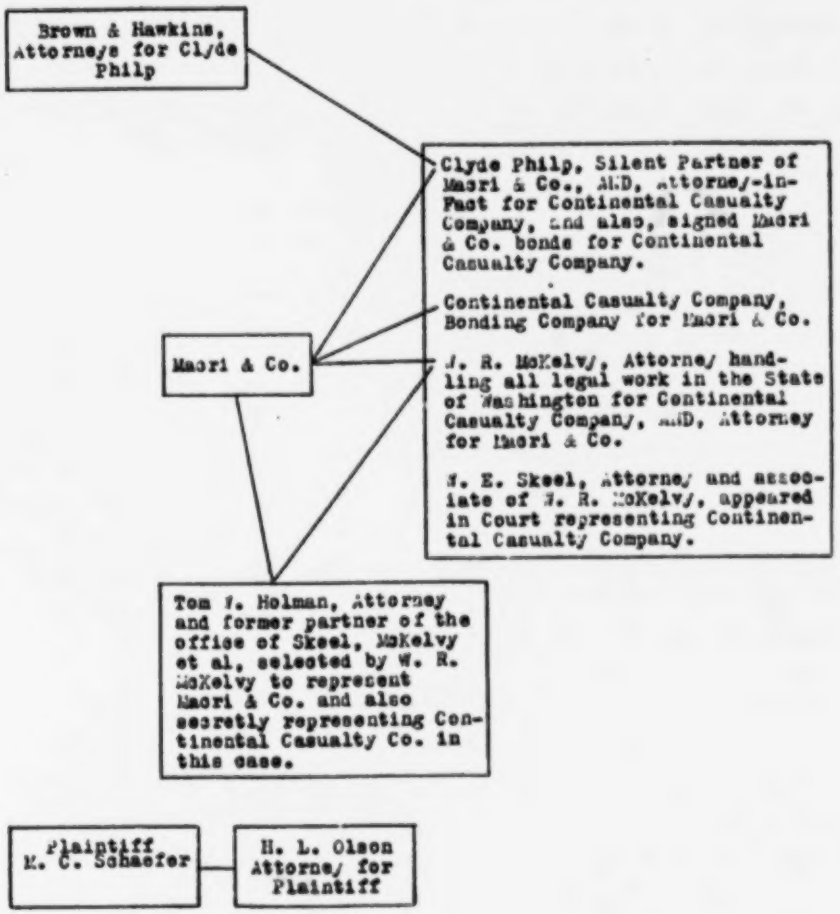


On October 20, 1945, W. R. McKelvy for the first time i Plaintiff that he could not represent Plaintiff in any Macri & Co. and the Continental Casualty Company.

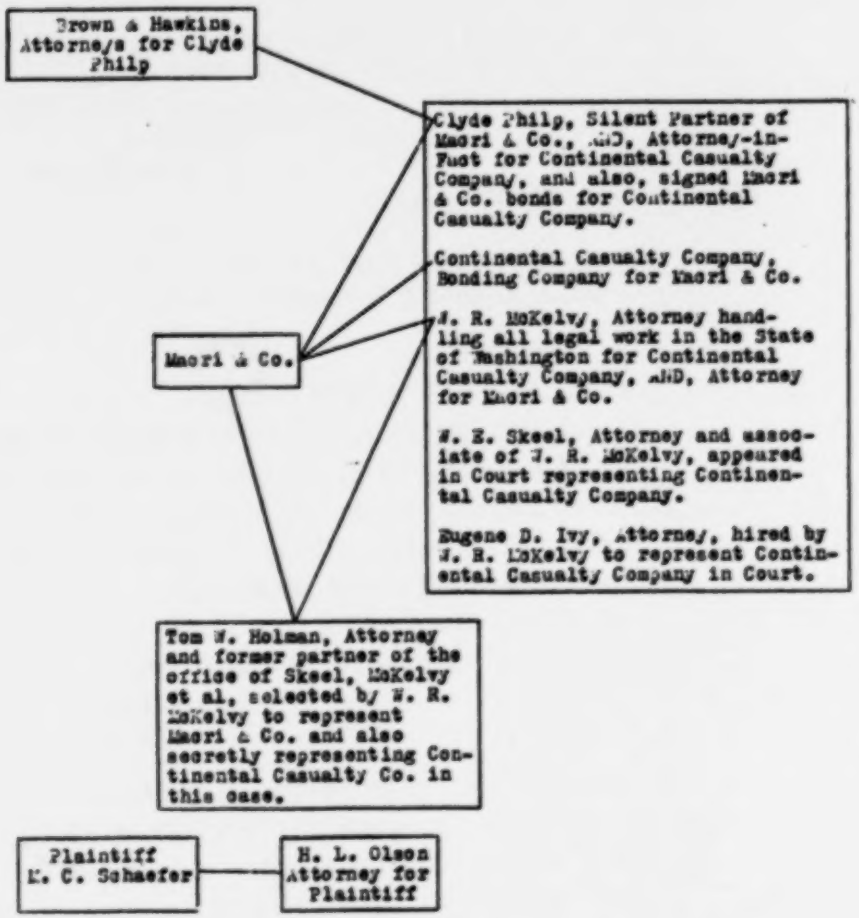
On October 22, 1945, Harry L. Olson, Attorney, was reta Plaintiff, and the organization was as follows.



On February 21, 1947, W. E. Skeel of the law firm of Skeel, McKelvy, Henke, Evenson and Shimann, represented Continental Casualty Company in Plaintiff's case Civil No. 246 in the District Court at Yakima, Washington, and the organization was as follows.

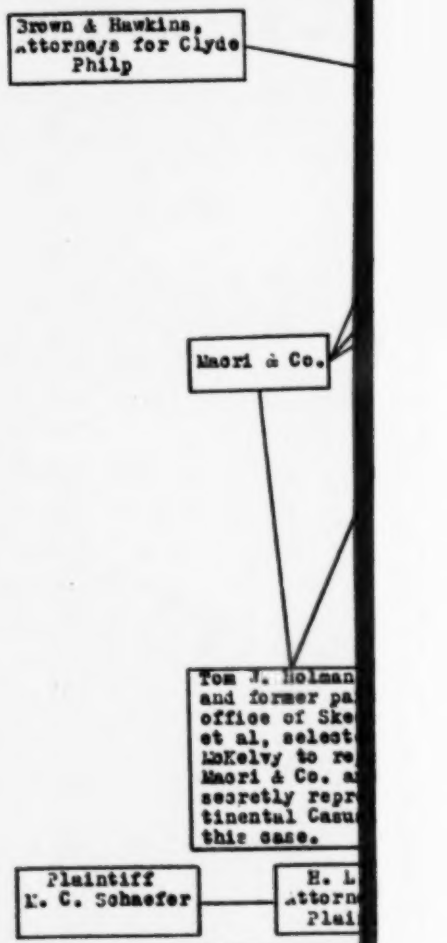


On and after February 24, 1947, during Plaintiff's case Civil No. 246 in the District Court at Yakima, Washington, and the organization was as follows.



On November 4, 1949 at the of
Washington, the Plaintiff was
satisfy Judgment on Job Speci
the District Court at Yakima,

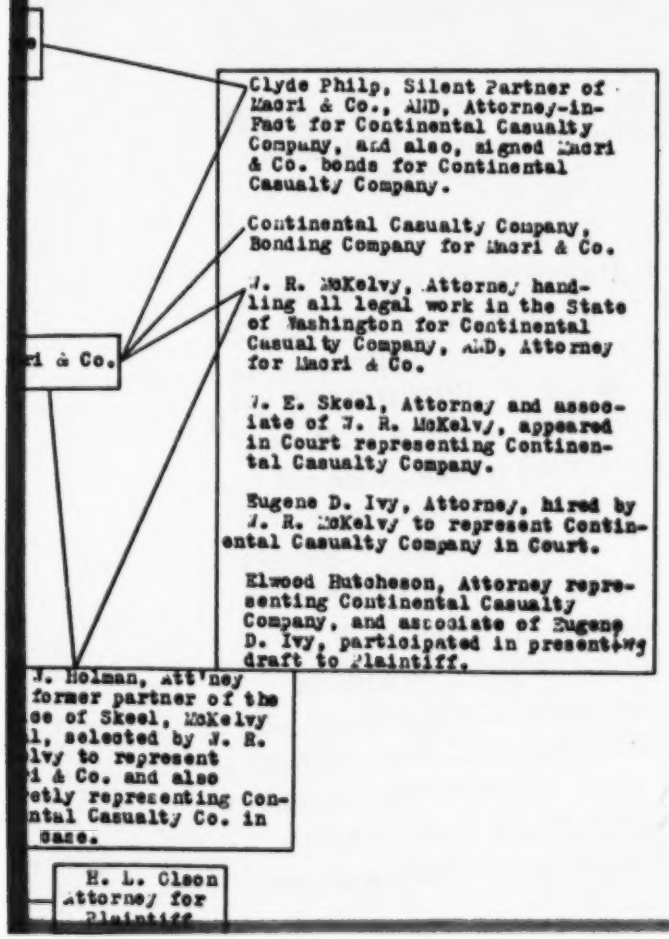
Before said draft was accepte
minute argument with Eugene I
the Continental Casualty Comp
Costs, etc.," were X'd out on
said attorneys for Continenta
McKelvy in Seattle for approv
would have deprived Plaintiff
suit.)



6.

9 at the office of Plaintiff's Attorney at Yakima, laintiff was presented a draft for his acceptance to n Job Specification #1062, in case Civil No.246, in at Yakima, Washington.

was accepted by Plaintiff there was a 2-hour and 10- th Eugene D. Ivy and Elwood Hutcheson, Attorneys for ualty Company, before the three words "Interest, X'd out on the back of said draft, and only after Continental Casualty Company telephoned W. R. for approval. (The words "Interest, Costs, etc.," d Plaintiff of his right to maintain this present



7.

After the conclusion of the above suit, and on October 12, 1950, th District Court at Yakima, Washington mailed a certified copy of Jud ment in Plaintiff's case Civil No. #246 to none other than the Law Firm of Skeel, McKelvy, Henke, Evenson and Uhlmann in Seattle, Wash ington.



DISTRICT COURT AT YAKIMA, WASHINGTON
MAILED CERTIFIED COPY OF JUDGMENT IN
PLAINTIFF'S CASE CIVIL #246 TO SKEEL,
MC KELVY, et. ux. FOR FILING IN
U. S. DISTRICT COURT AT SEATTLE,
WASHINGTON ON OCTOBER 12, 1950.

APPENDIX 8

TRANSCRIPT OF PROCEEDINGS BEFORE THE COURT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13129

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY, and Continental Casualty Company, a corporation,

Appellees.

UPON APPEAL

BE IT REMEMBERED that on this 9th day of April, 1952, at the hour of 11:40 o'clock A.M. the above-entitled matter came on for hearing before the HON. HOMER T. BONE, Judge, HON. WILLIAM HEALY, Judge, HON. WALTER POPE, Judge of the above-named Court in the North Courtroom, 8th Floor, United States Court House, Seattle, King County, Washington.

APPEARANCES:

M. C. SCHAEFER, appearing in his own behalf.

ALTHA P. CURRY, (of Messrs. Skeel, McKelvy, Henke, Evenson & Uhlmann) appearing for W. R. McKelvy and Continental Casualty Company, their attorney and counsel.

GRANVILLE EGAN, ESQ., appearing for Appellees Sam Macri, Don Macri, Joe Macri, their attor-

POOR COPY

ney and counsel; and

CARL E. CROSON, (of Croson, Johnson & Wheelon) appearing for Appellees Continental Casualty Company, a corporation, its attorney and counsel.

WHEREUPON the following proceedings were had and testimony given, to-wit:

JUDGE HEALY: Are you prepared to argue this case for the Appellants?

MR. SCHAEFER: Your Honors, my name is M. C. Schaefer, Matthew Clement Schaefer, in full. I am not an attorney; I haven't been able to get an attorney to represent me in this case, so, first off, I would like to make a few corrections.

On page 5 of the transcript of record, line 12, the words "on quantum meruit" should be changed to "for the reasonable value" as being the actual words used by myself at this meeting with McKelvy.

On page 257 of the transcript of record in the second to the last line, the words "again had an appointment," should be changed to "met," as this meeting was without previous appointment.

JUDGE HEALY: What line is that?

MR. SCHAEFER: That is on page 257, and the second to the last line on that page.

JUDGE POPE: Is this a misprint?

MR. SCHAEFER: A misprint, your Honor?

JUDGE POPE: Yes.

MR. SCHAEFER: No, it was a statement as

made by me.

JUDGE HEALY: You want to change what you said there?

MR. SCHAEFER: Yes.

JUDGE HEALY: That is not our usual procedure. However, you have indicated a change there and you may change it. You may proceed with your argument.

MR. SCHAEFER: On page 632 of the transcript of record, line 5, I state that I would give the Court the name of this attorney, and I did not give the Court his name, as I hadn't looked it up at that time. It was John J. Kennett.

Referring now to the second paragraph on page 2 of reply brief of appellant M. C. Schaefer, reading from page 1422 and further, and 1656 and further: in that second paragraph on page 2 of the reply brief, I say, "Sam Macri, Don Macri and Joe Macri were partners, with Sam Macri the head of the firm. They had a large volume of contracts with the Government and with the State of Washington, and now manage three or four companies doing a huge volume of business. But the head of the Macri organization that I dealt with, Sam Macri, during the time I was involved with them, while testifying under oath that he personally figured the job of which I had taken a part, and had been in the construction business 26 years, could not even read the simplest figures on a plan (see transcript of testimony in Case No. 11707—Circuit Court of Appeals, Ninth Circuit, pages 1422 and further, and

page 1656 and further). Yet, despite the complete lack of qualification of the Macris to engage in any kind of construction work, Continental Casualty Company in all Macris' deals, issued bonds guaranteeing their performance and payment. Why? Were the Macris merely fronting for Continental Casualty Company, or McKelvy and Skeel? Then, in addition we find Clyde Philp, attorney in fact for Continental Casualty Company, who is a partner with one Goerig, and the two are silent joint venturers with the Macris on the jobs I was involved with and many others before and after. Note that Philp, by reason of his position as attorney in fact, knows or can determine amounts of other bids being submitted and can therefore tip off someone fronting for him and others as to what figures to bid without doing any estimating of their own."

On page 1422 of the transcript in the Superior Court of Appeals, the second last line, in answer to a question by Mr. Holman, or rather, to the fourth question on that page appears the following:

(The following is quoted from the transcript above referred to:)

"Q. Mr. Macri, will you please tell the Court your personal experience as a general contractor, what have you been doing, and for how long, and what nature of work, and will you kindly talk loud enough and slow enough so that the reporter will get your answer?

"A. Well, I've been in the general construction

around 26 years, general construction and different types of building work, sewer work.

"Q. Could you give us some more about it? Get the volume up.

"A. Bridges, highways, disposal plants, and also did several of those defense project works.

"Q. Where was that defense work, Mr. Macri?

"A. Oh, we built quite a few in Bremerton, about 3,000, was a defense project in Bremerton.

"Q. Was that a housing project?

"A. Yes.

"Q. Now, did you have any project at Fort Lewis?

"A. Yes.

"Q. What was that?

"A. Well, that was a complete system, sewer and water main, and included manholes and catch basins, and some reservoirs."

Then dropping down and skipping one question—

"Q. Now, during that period, has your time been devoted principally to public works improvements? I mean by that, work for the cities and subdivisions and the Federal Government, or has your work been for private persons principally?

"A. No, we been out on jobs.

"Q. That answer I think wasn't responsive. What I wanted to know was whether or not you had worked principally during that period for public bodies as against working principally for individuals, persons: do you know what I mean?

"A. You mean competitive bid?

"Q. No, no. Mr. Olson.

MR. OLSON: Just ask him what he did.

"Q. Well, all right, Counsel. I want to know, Mr. Macri, if during your 26 years of experience you had a major portion or a considerable portion of your experience with either the United States Government or the State of Washington, or the counties or the cities or other municipal subdivisions?

"A. Well, we did the work for cities, State, and the Government, building jobs.

"Q. Well, did you also work for private parties, too?

"A. No, we never did private work."

Then we skip two questions.

"Q. Had you in your experience built bridges?

"A. Yes, we built quite a few bridges.

"Q. What kind of bridges?

"A. I built for the State Highway, Washington, we built quite a few bridges, and also we built the one across Lake Union in Seattle, about three miles long.

"Q. Across Lake Union?

"A. Yes.

"Q. And where is that bridge, Mr. Macri? What is that bridge?

"A. Oh, they call it Ballard Bridge, over in Seattle.

"Q. Ballard Bridge, across Lake Union, you constructed?

"A. Yes."

Now, on Volume 4, page 1429, the second question on that page:

"Q. Mr. Macri, did you make your own estimate for bidding 1062, Schedule 1, or was it made for you?

"A. No, I make my own bid."

Then, on 1430: the first question on that page:

"Q. Mr. Macri, did you try during the noon hour to locate any original figures you made on the estimate, you yourself made?

"A. Yes, I looked, but I haven't got them."

Then, on page 1656, and that would be the last question on that page:

"Q. Now, Mr. Macri, showing you Plaintiffs' Exhibit 12, page 65, and drawing your attention to structures 427 and 428, can you tell me by an examination of that structure, speaking of the 427-428 structure, how far it is from the--or how deep it is from the top of the wall to the floor of the invert in the portion of the structure located in the upper left portion of that diagram?

MR. HOLMAN: Just a minute. Your Honor, I object to this as improper cross-examination unless it is for the purpose of testing Mr. Macri's ability to read the plans. There's nothing brought up in the direct regarding that structure, or any other structure.

MR. OLSON: Well, that's the purpose of it.

MR. HOLMAN: If it is for the purpose of testing, I naturally don't resist.

THE COURT: Overruled.

"Q. (By Mr. Olson) Can you tell me how far it is?

"A. The elevation?

"Q. I want to know how far it would be from the top of that wall to the floor of the excavation, or floor of the concrete invert.

"A. Well, it is a 975,66—

"Q. Well, you are referring to the wrong one. I am speaking of structure 427-428.

MR. HOLMAN: Those are two structures. Which one, Counsel?

MR. OLSON: Well, they're two structures, but they're in the one excavation. I am referring to 427.

MR. HOLMAN: Are you asking about the excavation, or the structures?

"Q. (By Mr. Olson) How far is it from the floor of the invert located in the—the deepest invert on structure 27 to the top of the wall?

"A. You mean one by one, here, or—

"Q. Speaking about the portion of the structure that's in the upper left-hand corner of the diagram, the one I've got my pen on.

MR. HOLMAN: Would you give me that page?

"Q. On page 65; now, how far is it from the floor of the invert to the top of the wall?

"A. Well, the work here is 979.

"Q. Do you want some paper and a pencil?

"A. No, I don't need it.

"Q. Just tell me in feet?

"A. Huh?

"Q. Just tell me the feet.

"A. You mean the depth, or what?

"Q. Yes, the depth from the top of the wall down to the floor of the invert. Do you know how to figure it, Mr. Macri?

"A. Oh, I'm not too expert on this kind of stuff, figures, no; I'm not qualified as an expert.

"Q. In other words, you can't figure that?

"A. Well, if I get your point, I probably can.

"Q. Well, maybe I had better make myself clear. Do you know what the floor of the invert is? Do you know what this 'Inv' refers to, on that structure 427?

"A. Yes, that's the invert."

He answered after he was told.

"Q. That's the invert; all right. Now, that's surrounded by two lines which have some figures on it.

What does that indicate? Well, here Mr. Macri, I'll put my pen right on it, 427, page 65, of this exhibit.

"A. Yes.

"Q. And I am asking you how far it is from the floor of that invert to the top of the wall that surrounds it. Now, if you don't know and can't figure it, well, tell me, and we'll leave it.

"A. You want to know how deep it should be?

"Q. I want to know the answer to the question I just asked you. If you don't know the question,

we'll have it re-read to you. Are you unable to tell me the answer to that question from that diagram, Mr. Macri?

"A. No.

"Q. All right, thank you. You've been in the construction business for how many years, did you say, Mr. Macri?

"A. Around 26 years.

"Q. Huh?

"A. Around 26 years.

"Q. Did you ever get a job of this type that was on 1062, before?

"A. Not this structure, no.

"Q. Well, of this type of structure?

"A. I say no, it's the first one I had.

"Q. And you aren't able to look at the structure lay-out plan and figure the elevation, are you, as shown right on the plans?

"A. No; I had a minute to do it.

"Q. So that when you went out to look at the job and looked at these excavations, you weren't able to tell anything about whether or not they were to subgrade, or whether they weren't, were you?

"A. With the men I got on the job, yes.

"Q. As far as you yourself was concerned, you don't know how to figure it?

"A. Every contractor has a superintendent.

"MR. OLSON: I ask that be stricken.

"MR. HOLMAN: I join.

"THE COURT: It will be stricken.

"Q. As far as you yourself was concerned, Mr. Macri, you didn't know how to figure it, did you?

"A. Figure?

"Q. Figure whether or not the floor of the excavations was to proper grade or not?

"A. When we figure jobs, we don't figure those things ahead of time; we do that while we go along with construction.

"MR. OLSON: I ask that that be stricken.

"THE COURT: I doubt if he understands the question.

(Whereupon the reporter read the following:

"Q. As far as you yourself was concerned, Mr. Macri, you didn't know how to figure it, did you?

"A. Figure?

"Q. To figure whether or not the floor of the excavation was to proper grade or not?")

"THE WITNESS: You mean when we figure the jobs, or when we do construction work?

"Q. I am asking you if you went out and looked at an excavation, you, yourself, are unable and were unable to take these plans and specifications and this excavation and tell whether or not it complied with the plans and specifications and the structure lay-out plans; you, yourself, without any help?

"A. Myself, personal, I never measure one anyhow.

"Q. And you don't know how to do it?

"A. Probably when it was staked out I could measure it all right.

"Q. He said when it was staked out, I think, but you, yourself, without some help from somebody, don't know how to do it; that's true, isn't it?

"A. Yes."

Now, despite the above showing of 26 years' construction experience, the lack of ability to estimate work, and the showing of the size of jobs undertaken by the Macris, and the great volume of business, Macris' attorney, Mr. Granville Egan, on August 7, 1951, came to the counsel table where I was sitting, and wanted to set me straight that I broke the Macris.

The following is a memorandum of said conversation.

(Reading)

"Even after the session—

JUSTICE HEALY: Court will have to adjourn now until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, the hearing in the foregoing entitled matter was adjourned until 2:00 o'clock P.M.)

AFTERNOON SESSION

JUDGE HEALY: I think that I should advise you that you have forty-five minutes altogether in which to present your case. You have already used 22 minutes, and you now have 23 minutes in which to complete your case.

MR. SCHAEFER: Thank you.

Now, if I may continue — the following is a memorandum of said conversation:

"Even after the session on August 7, 1951

Mr. Egan, Macris' attorney, came to the counsel table where I was sitting and said, 'I want to set you straight on one thing. You broke Macri.' Plaintiff said, 'How do you figure that I broke him? He hasn't paid the judgment to Continental, and he is now operating three or four companies. He just bid a job with Rushlight at Alaska for a million and a quarter.'

"Egan said: 'He didn't; that's his son Steve.'

"Plaintiff said, 'How old is he?'

"Egan said: 'I don't know just how old he is. He was in the last war, I think he's about 27.'

"Plaintiff said: 'And he's got that kind of money at that age? And where did he get it?'

"Egan said, 'Macri is broke, and you broke him.'

"Plaintiff said, 'And what is he doing now?

"Egan said, '"I don't know; he's working as a foreman, or something like that for the boys.'

"Plaintiff said, 'Foreman? Why, that man can't tell you the height of this table if you had an engineering measurement on the floor and another on the top; that has been proven in the other case.'

"Egan said, 'You know this type of people from North Africa, if their folks are a failure in business and they get about so old, the kids just take the old folks out and kill them.'

"Plaintiff said, 'They do?'

"Egan said, 'Yes, they do; they are a tough lot'."

I would like to tell Mr. Egan at this time that I believe I am a better friend of his own children's ambitions in the years to come by fighting this rotten condition than he is in representing such peo-

ple. I think it is a clear situation that an attorney picks an argument as the above, and that an insurance and bonding agent, Mr. B. J. Rask, puts on the pressure he did by foretelling the events so accurately to this point, and that I could not get an attorney to represent me, but that the defendants have been able to have three and at times four attorneys in court in connection with this case.

Now, since Mr. Croson felt that the plaintiff's motion for Order Permitting Filing of Supplemental Complaint should not be granted (see transcript, page 558), and not wanting any similar objection raised, I wish at this time to solemnly make oath on the Bible that all complaints and statements made by me in this case are true to the best of my knowledge and belief, and that nothing contained therein is for the purpose of confusing the issues, so help me God.

(Witness places Bible on the stand.)

Now, I swear to the things I have just read to this Court.

Sam Macri told my superintendent on the job in the last part of September, 1944, and again just shortly before Christmas, 1944, that he should tell me if I was short and needed money, he would loan me some; that he had lots of money.

B. J. Rask also offered to do us a lot of good and could perhaps help us to the needed money, so we could go into general contracting.

In that connection, I think the same thing that happened to me has happened to others, and I

would like to advise some of those who think that this is funny to get a copy of the Kefauver Committee's Report on Organized Crime, and look up Detroit, on page 52, and see how that outfit was taken over by an outfit that didn't have any more capacity for taking over that kind of business than Macri has for operating the type of business he is in.

"Road Group Sues Builders' Firm." That is from the Oregon Journal, April 24, 1951, and I quote:

> "The State Highway Commission filed suit in Circuit Court Monday seeking $8,634, the amount of a performance bond, against the State Construction Company and Continental Casualty Company. Commissioners allege that the construction company was low bidder last April to construct five piers for the new bridge over the Willamette River connecting Marion Street in Salem and the Salem-Dallas Highway. The construction company offered to do the job for $172,699, and after its bid was accepted, refused to sign the contract or put up the performance bond, Commissioners complain."

Then I have another clipping where it states: "Soule, Stateside offer low bids on Coos Bay jobs." In this case Soule Company bid $62,895; State Construction Company, Seattle, $84,893; Stateside Construction Company, $84,455. And on a job here that Stateside Construction Company bid $172,000 the only other bidder on the Bayview-Ferndale District, was State Construction Company, $228,366, and I am told those two companies are the same outfit as the Macri Company.

Now, on page 323, Mr. Croson speaking in the transcript of this case:

"Now, your Honor had entered the judgment allowing the amount, allowing costs, and certain items, so that all were intended to be covered; finally, I presume that the parties agreed that the word 'judgment' might cover the whole thing."

Evidently he felt that judgment covered the whole thing, but I demanded those words be x'd out on the reverse side of the draft before I accepted it. They did put up a supersedeas bond for cost, a supersedeas bond, and starting on page 119 of Volume 1 in the old Yakima case—that is in the Circuit Court of Appeals—and in the last paragraph on page 120, it reads as follows:

> "Now, the condition of the above obligation is such that if the said Continental Casualty Company shall prosecute its appeal to effect and satisfy the said judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then the above obligation is void, else to remain in full force and effect."

Now, on page 628 of this case, we have filed affidavits that the record as appears herein is not true and correct. I want to point out where there has been cases from the record as it should be. On page 628:

"THE COURT: Mr. Schaefer, are you directing

a criticism at the Court?

"MR. SCHAEFER: The answer correctly stated should be 'I am just quoting. I have just quoted what was said here, your Honor'."

I don't know what the intention was, of course, of asking me that kind of a question.

"THE COURT:"—

Then, instead of what it says there in the transcript, he said, "Are you claiming prejudice on the part of Judge Driver?" To which I said, "Yes, I am, your Honor," and not as stated herein. I think that is borne out throughout the case before Judge Driver.

On page 293 of the same volume, the Court said: "Before that, it was Skeel and Whitney; I worked there for six months in 1916. Scarcely any member of the Bar in the State of Washington hasn't at one time or another. I worked in Skeel & Whitney's office from June to December, 1916, the year I graduated from law school."

Then, at the start of the fourth line of the last paragraph on page 338, Judge Driver says:

> "Here is a case that was a very close and difficult one, I think. I happen to know Mr. Olson was very much concerned about it and didn't think his chances were too good of winning in the Court of Appeals; I thought the chances were not much more than even. I wouldn't have bet one way or another what the Court of Appeals would have done."

Then on the third line of page 339:

> "I thought it was a hard fought, close lawsuit in which I might just as well have found against you as for you, it was that close."

Then down from that two lines:

"I think perhaps you have come to the realization which many litigants don't, that litigation necessarily and unfortunately is expensive, and that it isn't as profitable even for the winner as is sometimes thought."

Then on page 340, starting with the second line:

"I didn't think your skirts were any too clean, either."

On page 343, in the last quarter of the page, I would say:

"The fact a busy lawyer in a large firm may have overlooked the fact that he had some conflict of interest there, that is the only thing you've got, as I see it, that wouldn't be in the ordinary course of this kind of a transaction."

Then the Court, on page 344:

"Well, if the Continental Casualty Company had made a deal with McKelvy to block you out of Court, don't you think they'd have blocked you another month, until your Statute of Limitations had run, the one year statute under the Miller Act? McKelvy must be a very bungling conspirator if he doesn't hold you up another month and keep you from going into Court."

The Court's opinion on page 438 is quite long, and I doubt that I will be able to get through all of it within my time allowed, and I would ask that it be fully read, because I think it will give ample proof that such statements by Judge Driver were not warranted, especially as to its being such a close case. It would have been a close case had I sued — brought that suit in damages instead of quantum meruit. I think that is the reason that

Judge Driver makes all these references. That is the thing he is referring to when he refers to the close case.

Then they have talked at some length about me not going broke. Right here are four summons by four different parties, and I don't believe the amount is over a few hundred dollars, but I couldn't at the time during the course of this job out there, prevent these papers from being filed against me. These overt acts against me have cost me better than $46,000 to prosecute. Judge Driver found and said that the general contractor breached his contract; that said breach was from the very start of the job to the very last day of their operations on the job, and that it was willful and negligent.

Here is a photostat copy of the Seattle Times of July 18, 1945, in which "Stephen Macri Gets Deferral."

Then on March 21, 1945, there is a picture of Stephen Macri, "$18,000 Theft Laid to Clerk."

In this print here, I have pictures of four inventions that I can go ahead with. I have been working on an automatic reader which it would require at least $35,000 to complete, and I can't go ahead with that because I am devoting my time to the prosecution of this case.

I have thought of not bringing this suit because I knew it was going to be a tough proposition. I am not an attorney, and I know what they say about an attorney representing himself in a lawsuit.

In the course of this suit, Mr. McKelvy was in the courtroom, to my knowledge, he was in the court room and he stayed in the court room until it was my turn. Then he got up and immediately backed out.

I believe that your Honors have gotten the copy of my reply brief, with the photostatic copy of the organizations attached, and I think that is about as much as I have to say.

I sincerely hope that your Honor will go through this file, because, as a layman, I know that I can't make a presentation of my case verbally before your Honors that I would be able to were I an attorney; but I believe that the Lord visits on no man a greater responsibility than he is able to bear; that if a man will but ask the help of Christ and if the truth is known. The way I see it, 100 years ago slavery was not thought to be terrible, but was defended by many people, including Ministers of the Gospel and Judges, but that evil is now buried hell deep; but today, we are faced with a new form of slavery which, if not checked soon, will affect more people and will be more damnable.

MRS. CURRY: If your Honors please, we will divide the time between the three of us. First, I wish to explain what this suit might be about. The Appellant has labelled his complaint a complaint in conspiracy. This is the third complaint. The one before the Court is a third complaint, and motions to dismiss were sustained on all three of the complaints, to the last one, with prejudice to file an-

other. There was no difference in the three complaints, except in the form, and in this complaint—this complaint before the Court, the Appellant simply incorporated a lot of exhibits by reference, rather than by incorporating them in the body of the complaint as before. The facts in all complaints are the same.

Paragraph 6 and 7 of the complaint attempt to state a cause of action in damages in conspiracy.

Paragraph 6 has alleged the parties conspired together, and then alleges, to support what he labels as overt acts, first, that Macri got a prime contract for the construction of the Rosa Project in the Yakima County; then Mr. Schaefer got a subcontract from the contractor, so that in effect, he was a sub-contract to the Macris; then he got the bond; then he went ahead to prove that Macri breached his contract. Now, I am referring to where Mr. McKelvy comes in on that — where he brings Mr. McKelvy in as a co-conspirator.

He says in November of 1944 when he came to McKelvy and employed him to bring suit in quantum meruit against Macri, that he divulged all the facts of the case to Mr. McKelvy and that Mr. McKelvy strung him along. The only allegation against Mr. McKelvy, as far as conspiracy is concerned, is that allegation of his holding up the complaint until the day—that Mr. McKelvy strung this thing along until October 20, 1945, when Mr. Schaefer then faced him and said, "What about it?" And Mr. McKelvy said, "I can't represent you because

we represent Continental Casualty Company and we can't represent you in a lawsuit against Macri."

He went to Yakima and employed Mr. Olson, which the record will show on page 36—that he was employed upon the recommendation of Mr. McKelvy, to bring his lawsuit against Macri.

In the meantime, there was a suit brought by Macri, and by the way, Glen Falls, who were also on his bond, sued,—brought suit against Macri, and all this litigation, this argument, as to whether he could collect from Macri or Macri could collect from him was tried out in the Yakima lawsuit and he got a judgment of $57,000.

Continental appealed the case and in the course of time, the Circuit Court got the appeal and judgment was rendered against Continental Casualty Company and Continental paid, altogether, with interest, $66,000.00. Petitions for a writ of certiorari was applied for and denied, and Continental paid.

Mr. McKelvy presented a bill for services rendered to Mr. Schaefer, and Mr. Schaefer refused to pay it. Mr. Schaefer tried to get a lawyer and he couldn't, so he brought this lawsuit himself. And that, in brief, is the complaint.

At the last motion hearing on the last complaint, he tried to incorporate a supplemental complaint, in which he tried to bring in a person named B. J. Rask as a party defendant. Who B. J. Rask is, I don't know, but he said Rask came into his place and threatened him; also there was in that complaint some allegation that Mr. McKelvy repre-

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sented Macris and Continental in some other litigation, and he wanted to make him a party.

In order not to have any further delay, we all consented to stipulate that whatever allegations this party had could be considered part of the complaint, for the purpose of arguing that motion to dismiss. So that brought in those two factors. I didn't know who Mr. Rask was, but he incorporated some statement in his reply brief as to what Mr. Rask said to him, and back and forth about who Rask represented, but I don't know.

Anyway, that is the complaint,—that is the basis of the suit.

Paragraph 7 of his complaint contains allegations of damages in saying that, "the premises aforesaid,"—that is on Page 4 of our brief, "And all Acts and omissions of the Defendants and each of them, in furtherance of their aforesaid preconceived and considered plan and conspiracy, and as the direct and proximate result thereof," he suffered damages in that his reputation was hurt; his personal credit was hurt; he wasn't able to produce some invention, and he suffered financial loss. The complaint as set forth states no cause of action whatsoever in conspiracy or anything else. Anything wrong that is alleged in the complaint of anyone, is on the part of the Macris, for which he sued and got a judgment in the Yakima County Courts, in the suit that was appealed and in which the Circuit Court formed their judgment.

Now, he is trying to say it is a suit in conspiracy.

There is no such thing as a suit in conspiracy for damages. The general purpose of a conspiracy is to bring some people to enter into a conspiracy, or to enter into a conspiracy, or to enter into an agreement to perform this wrongful act,—by direct participation in the actual act. You have to have an overt act, and that overt act must be a wrongful act, except as might occur under very unusual circumstances as sometimes occur in a boycott case where by the very force of numbers the members make a wrongful act out of what would otherwise be a lawful act of the individual, but the general rule is that in order to have a conspiracy you must have a wrongful act that would give rise to court action by the individuals. In other words, to have a conspiracy, there is no wrongful act here except possibly the breach of contract by the Macris, which was compensated for in the other lawsuit, and the courts had held it a matter of course that you can't recover twice by putting a label of conspiracy on something for which you have recovered.

THE COURT: What is the claim made against Mr. McKelvy?

MRS. CURRY: The only claim against Mr. McKelvy is that Mr. Schaefer employed him on November 1st, 1944, to bring this law suit.

THE COURT: To bring which suit?

MRS. CURRY: The lawsuit which was finally brought by Mr. Olson of Yakima, and they recovered on that, and that Mr. McKelvy stalled him until within a month of the period of statutory

limitations, when he told him the statute would run out if he did not bring his suit within a month, and Mr. McKelvy said he could not represent him because his office represented Continental Casualty Company.

Now, there is one thing we take rather seriously, which is the last part of my brief. I didn't mean to bring it up here, but he accuses Willard Skeel, who is a member of our law firm of Skeel, McKelvy, etc., of representing Continental in that lawsuit which Mr. Schaefer brought. That isn't true, and the records will show that in Mr. Schaefer's lawsuit in Yakima, it came on for trial on February 24th, and on February 21, 1947, there were five use cases brought on behalf of Continental and it resulted in Continental having two judgments, and Willard Skeel did represent Continental in the first use case, but Mr. Schaefer wasn't party to that case. But in some manner or other when Schaefer's case came on for trial, a part of the proceedings was incorporated for convenience in his case.

It is not true that anybody in our firm has represented anybody in Mr. Schaefer's lawsuit, which he brought in Yakima, for which he got a judgment. Schaefer wasn't a party to the five use cases in which our office, through Mr. Skeel, represented Continental Casualty Company.

As I said, you must have an overt act—a wrongful act; and there is no wrongful act alleged, certainly not by Mr. McKelvy in this case. He alleges he did not bring the lawsuit. And as if it were a

possible breach of contract; there is no difference, because he did bring the lawsuit through Mr. Olson of Yakima, and he got, as Judge Driver said, almost 100% results.

He attempts to bring in a whole bunch of people, and alleges a whole series of acts, which he says resulted in damages to him.

THE COURT: In what way does he claim he was damaged?

MRS. CURRY: I don't know. He says, just like he has told you today, that he was damaged in the sum of $46,000.00, because he wasn't able to produce an invention, and that his personal credit was injured.

THE COURT: By what?

MRS. CURRY: I don't know. That is the allegation in the complaint. Now, you have an allegation of damages in the complaint, because of conspiracy. He does not allege any more than he was damaged one million dollars because his personal credit was injured.

THE COURT: Injured by what?

MRS. CURRY: All these acts I have just enumerated, and as Judge Driver said, the only overt act in this action is the ordinary defense of a lawsuit by Continental and Macri.

THE COURT: When was this second suit brought?

MRS. CURRY: Judgment was in 1947, Your Honor.

THE COURT: When was this suit brought and

tried?

MRS. CURRY: It was tried February 24, 1947.

THE COURT: Did that suit embrace the contentions set forth in that he was injured — he claimed his credit was injured?

MRS. CURRY: That suit was against the Macris, and the Continental bondsman for the Macris.

THE COURT: Was he on the Macri contract on the Rosa?

MRS. CURRY: It was a suit involving a subcontract that Mr. Schaefer had with the Macris, and the Macris had a prime contract. Schaefer had the subcontract. He brought a suit in quantum meruit against the Macris and Continental Casualty were the bondsmen for the Macris in that suit, and he recovered a judgment of $57,000.00, which was appealed to the Circuit Court, and the judgment was paid by the bondsman to the tune of some $66,000.00.

THE COURT: Mr. Schaefer received some $66,000.00 from that judgment, including interest?

MRS. CURRY: Yes.

THE COURT: Did he claim he was injured by the settlement?

MRS. CURRY: There was no settlement; it was a payment of the judgment of record.

JUDGE HEALY: Wasn't a writ of certiorari applied for?

MRS. CURRY: That they actually injured him in some way or other,—he goes back and complains that McKelvy didn't bring suit promptly.

JUDGE BONE: Wasn't the right to begin suit barred by the statute?

MRS. CURRY: Yes.

THE COURT: He claims he was injured by the certiorari action?

MRS. CURRY: Said he was injured by their very appeal to the court.

THE COURT: Is that part of the complaint?

MRS. CURRY: Your honor, that is part of the complaint, A, B, C and D. I want to take time to show you that the complaint,—that Paragraph 6, and Sub-Paragraphs A, B, C and D,—

THE COURT: On what page? On what page does that occur?

MRS. CURRY: I have made a summary on Page 2, beginning at the bottom of Page 2 of my brief,—That is the little grey brief, McKelvy brief, Page 2 of that brief of ours. Beginning at the bottom of Paragraph 6 is the paragraph in which he attempts to allege a cause of action.

JUDGE BONE: What page is that?

MRS. CURRY: Page 2 of my brief. First there is the general allegation that the Defendants, "with malice and intent to injure Plaintiff in his performance of said subcontract, and otherwise to unlawfully and in accordance with a preconceived plan confederate to bankrupt Plaintiff and ruin his business and credit. In furtherance of said conspiracy, the Defendants engaged in 'a series of tortious acts consisting of—' " that is quoted from the complaint; then beginning with Subparagraphs 9 to K inclu-

sive,—A and B tell of the contract of the Macris, and of the subcontract. C and D have McKelvy in; he said McKelvy became a co-conspirator on November 1, 1944. He employed McKelvy to bring a suit against the Macris, for, as he said, the Macris had breached their contract. Then he says that he told McKelvy all about it, and McKelvy told him to finish the contract, which he did, under protest, and then McKelvy suggested that "certain courses of action,—" which would have been a fraud on his creditors.

Our office was representing Glen Falls, his own bondsman, so it does seem rather absurd. The 30-day delay in bringing action before Judge Driver,—he said the firm of McKelvy is bringing the lawsuit in due course, and of course he talked himself out of court when he says at the very end, "which was prevented by the diligence of Plaintiff."

In October, on October 20, 1945, McKelvy ceased to be in the employ of Mr. Schaefer, and we submit that the Statute of Limitations runs against that, either the two or the three year limitation, and of course, even though Mr. McKelvy did anything tortious,—

And he testified he brought this suit in Yakima through Mr. Olson, and as referred to on Page 356 of the record, which will show he employed Mr. Olson on the recommendation of Mr. McKelvy, and he won his law suit. Then he also relates that the Macris brought a suit in Oregon, which he referred to as "wilful abuse of legal processes." Then the

case was heard before Judge Driver. Now, Judge Driver was the trial judge of that action in Yakima, and Judge Driver also heard one of the motions in this case, and the motion was directed to the second complaint,—the amended complaint.

They said that the conspiracy was "furthered" by the Macris,—Philp and Goerig,—and Continental Casualty appealing the Yakima Judgment to the Circuit Court,—and there is something about the joint venture of Philp and Goerig.

Then too, a writ of certiorari was applied for and denied, and the judgment was paid. That seems to be an overt act. Mr. McKelvy asked him to pay for the service rendered, and he refused, and he sought to engage to a lawyer for this lawsuit, and was unable to do so.

Paragraph 7 is the only paragraph that attempts to allege damages, in which he says, "damage by loss of personal credit with which to conduct business; he suffered severe financial loss as a result of the curtailment of his business activities, suffered damage to his reputation, and suffered mental anguish, and was prevented developing and marketing certain inventions, all to his damage in the sum of one million dollars."

Those are all generalities on which he attempts to allege damages. And of course the damages are inferred as a matter of consequence from the acts.

There wasn't anything in this complaint from which you can infer damage, especially with reference to collecting $66,000.00 judgments, including

interest, as in Farmers' Elevator Service vs. Hogan (D.C., Mo. 8 F.R.D. 230) and the court held that this must be a wrongful act; further, that the complaint must show how the plaintiff sustained his damages, and it is held by the text writers that it is not sufficient to allege damages as a mere conclusion of the pleader.

Judge Neterer had an unusual case in which a woman instituted suit in conspiracy, in which she sued several persons,—alleging that she was actually shanghaied — that she was shanghaied out of Honolulu to Yokohama on one steamship line, and then from Yokohama to Seattle on another, and when she arrived in Seattle, was taken up to Harborview Hospital and charged with insanity. Judge Neterer said, "You have alleged a whole series of torts in those acts, and if you have suffered any damage, you had better get a lawyer and bring your suit, but you haven't alleged conspiracy."

In this case the man has alleged a whole series of acts, but in no way has shown any preconceived understanding or agreement. You have to have an understanding or agreement of some kind, and the allegations of the complaint must show beyond doubt that there is an agreement or understanding between the parties. That is absent in this case. There is no wrongful act, no agreement, no damages shown in this complaint; therefore, I submit there is no cause of action.

Mr. Croson will address the court, if Your Honor please.

MR. CROSON: I am Carl E. Croson, of the firm of Croson, Johnson & Wheelon, and I appear for the Continental Casualty Company.

It has been well said with respect to the law on conspiracy,—I think it is pretty well understood as to what conspiracy is, but just as an approach to what I have to say, may I just indulge in a few statements with respect to the act of conspiracy or charge of conspiracy.

The court has said that the gravamen of a civil action for conspiracy is found in the overt act which results from the conspiracy and which culminates in damage to the Plaintiff. I wish we might have that in mind as we consider the facts in this case, for the effect of the charge that the Defendant conspired is to fix a joint liability on the Defendant for the damage that resulted from the overt act performed by one of them.

Now, going back to the case as it has been presented to Your Honors, it is alleged that that is a suit in conspiracy. The parties joined are the Macris who were prime contractors, and the bonding company that gave a bond to the Macris, that bonded the Macris, the prime contractors; W. R. McKelvy, the attorney whom the Plaintiff alleges he consulted with respect to a difference of opinion that he had with the Macris,—and in Mr. W. R. McKelvy, who was one of the attorneys of the firm of Skeel, McKelvy, Henke, Evenson & Uhlmann here in Seattle. He handled the matter, worked with the Plaintiff for some time, and, as the Plaintiff

alleges,—

JUDGE BONE: What was he working with him for?

MR. CROSON: Apparently, if Your Honors please, he was to work with the Plaintiff, with the attorneys for the Macris, Tom Holman,—to work with him in trying to see if this matter could not be worked out. And I have only the record in the Olson trial in Yakima,—the record there is clear.

But when it came to the matter of bringing suit, then it was Mr. McKelvy told him that he could not carry the suit against the Macri Brothers, because the Macris were bonded by the Continental Casualty Company, and the Continental Casualty Company was a client of McKelvy's office. This is the way the parties all come into this general allegation of conspiracy.

Upon Mr. McKelvy telling him that he could not bring the action, the record is quite clear that Mr. McKelvy gave him the names of attorneys over in Yakima; that he then went over to Yakima and selected an attorney, Mr. Olson.

In Judge Driver's remarks about the handling of that case, he commended Mr. Olson for the way in which he handled the case, and a full judgment, almost 100% was secured by Mr. Olson against the Macris.

The Macris appealed; Continental Casualty Company appealed, and both parties exercised their legal rights to appeal, after almost being invited to by Judge Driver, to appeal the case. Judge

Driver having stated in his record here clearly that it was a very close case, and as Mr. Schaefer has said, he could have found either way on the case.

Now, that appeal,—that number one appeal,—is the appeal that is complained of. That is a court proceeding that is complained of, if Your Honors please. Then there was the writ to the Supreme Court, and again that is complained of by this Plaintiff, as an effort to do one thing; that is, to try to break him.

Now, let's go back again to the beginnings. In conspiracy, there must be, very definitely, No. 1: there must be a preconceived program. Now, when was the plan,—the scheme—when was it conceived? When did they get together to have any idea as to what they were going to do to this Plaintiff, in order to have a conspiracy?

Was it at the time that the Continental Casualty Company became the bonding company for the Macris? Why would he think that they would get together and devise the idea of breaking him, the very person that the Continental Casualty Company was protecting by reason of its bond? He, among others.

Now, falling back on the law of conspiracy, not only must there be a preconceived idea, but there must be an agreement between the parties that they are going to act together, and that action will result in the thing that they planned to do.

The plan,—now, who made the plan, and when? It isn't in the allegation. Or, it isn't alleged, other

than in some general way that it was their purpose to try to break the Plaintiff.

Now, not only do we have a situation that there must be the intention,—not only must there be knowledge of the conspiracy in order to hold the parties as conspirators, there must be the intentional purpose in the transaction, with a view to the furtherance of the common design and purpose.

Now, here we have the Continental Casualty Company in this suit, and where is there alleged any fact of any nature or kind that they intentionally did move to carry out a design to break this Plaintiff? Now, the only thing that is complained of, if Your Honors please, and this complaint is very long,—the facts are alleged,—I won't say that the facts are alleged, but the allegations are very lengthy, running into many, many pages, and all through these three different complaints that have been presented to three different judges of the District Courts,—I could go into that to give you all the details of that,—but all through them all, there is nothing—not a thing that is alleged as an act on the part of the Continental Casualty Company, until we come to its appeal from the decision of Judge Driver. Then the complaint is made that they conspired with the other Defendants.

The appeals were separately handled, separately appealed on different grounds, and on different bases for the different parties that were appealing.

Now, it is true that there are times when you can possibly sustain an action in conspiracy, or any

action, by circumstantial evidence. The courts have been very clear on that, and I shall refer to the statements from the courts, that there must be intentional participation in the transaction, with a view to the furtherance of the common design and purpose, and let me show you what the courts have said.

Dart vs. McDonald in which it was alleged there was a conspiracy prior to the time the Respondent subscribed for stock.

This is the statement of the court: "It is unnecessary to cite authority to the proposition that before a party can be held liable as a conspirator, the evidence must show that such a person entered into an agreement with the other conspirators to accomplish the object of the conspiracy."

Reading again in the same connection: "It is true that it is not necessary, in order to establish a fraudulent conspiracy, that it be shown by direct evidence. It may be established by facts and circumstances; but as above stated, these facts and circumstances must be inconsistent with an honest purpose and reasonably consistent only with the intent to defraud."

Now, when could we, by the wildest stretch of imagination, believe that the bonding company who was going to have to pay for the default of the Macris,—if they would have to pay, where can it be conceived that they would enter into any plan or design to break this Plaintiff?

The Macris were already in default; they would

have had to pay whatever loss he sustained. Now, he did bring this in, he made full recovery, and if Your Honors please, we appealed it once, first before Judge Bowen, who assigned it to Judge Lemmon, and Judge Lemmon went into the matter, and waded through some seventy pages of the complaint.

JUDGE BONE: How many pages?

MR. CROSON: It strikes my mind that it was seventy-eight. It was a very long complaint, but it is in the record, of course.

After wading through all of that, I never heard a man that more patiently tried to tell the Plaintiff how he must plead,—just what he must plead in order to remain in court. Our motion, brought under Rule 8, was granted.

An amended complaint was served. This time, practically all of the expected evidence that was to be presented was pleaded in the complaint, and again that was presented there to Judge Lemmon, then it came before Judge Driver. It so happened that Judge Driver was quite familiar with the matter because he had been District Judge who tried the case over there in Yakima, and I hope Your Honors will take the time to read through this statement, long as it is, it is very enlightening in the way Judge Driver again tried to help the Plaintiff state his case, telling him how to do it.

JUDGE BONE: Did he read the whole pleading?

MR. CROSON: Yes, it is all in the transcript, Judge Bone. A full transcript was taken of the

case, and a full transcript of it is before Your Honors.

The matter came again when the second amended complaint was filed, and Your Honors will find that in that transcript we also went to the trouble to take every allegation of the second complaint and show where it was filed in the previous complaint, so as to show there was nothing new or different in the second amended complaint. What was put in the second amended complaint was put in and supported by exhibits, so that it would be an allegation, but—then the exhibits to the complaint made it the same thing, virtually, that had been in the complaint that had been heard before Judge Driver.

JUDGE HEALY: This case has moved around to the three different judges, so that they all had a chance to pass on it?

MR. CROSON: Every one. It came up first in our motion to dismiss, and that was granted after Judge Lemmon,—after he very carefully admonished the Plaintiff what to do, and gave him plenty of time to file an amended complaint. That came up before Judge Driver, and again we waded through the whole complaint, and Judge Driver made the same ruling, and gave him the same privilege, to make a second amended complaint. At that time we did ask that the matter be dismissed, and in that request we were joined by the Plaintiff himself, and the matter of the second amended complaint had been heard before Judge Lindberg.

The record will show that the order that Judge Lindberg entered,—that will show it was entered on our motion, and concurred in by all parties, including—

JUDGE BONE: He joined and made a different action, so that it could be heard in Federal Court?

MR. CROSON: That could be one of the reasons, it came up from the District Court, and I think that is the only ground. He is an Oregon citizen, Mr. Schaefer is an Oregon citizen.

I am sorry I missed that point. I didn't think what the jurisdiction was, but the Plaintiff is an Oregon citizen.

Now, if Your Honors please, I hate to ask Your Honors to do it now, but the time is so short to present this case, and if this has been so voluminous all the way through,—we feel that our motions were well taken before all three of the judges, and we feel that Judge Lindberg exercised proper discretion in dismissing the action, and that he could not file and had not filed a proper complaint. Thank you.

MR. EGAN: May it please the Court, my name is Granville Egan, and I am attorney for the Appellees Macris.

The Macris had a contract with the Reclamation Bureau of the United States to do certain work, and they entered into a subcontract with the Plaintiff,—the Appellant, Mr. Schaefer. Mr. Schaefer brought an action against them in Yakima,—against the Macris, and he secured a judgment, and their bonds-

man, the Continental Casualty Company, satisfied the judgment.

Now, the Appellant, Your Honors, has brought an action on conspiracy on the allegation that the Macris, as set out in Paragraph 6 of his complaint: "That Defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage and defraud the Plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause Plaintiff to become financially bankrupt."

The complaint further states, "To cause Plaintiff to lose his business and its assets, to ruin the Plaintiff's business and personal reputation and credit. In furtherance of said wilful, intentional conspiracy as aforesaid, Defendants engaged in a series of tortious acts continuing from the inception of work by the Plaintiff under the contract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part of the following:"

"The Defendants Macri in furtherance of said conspiracy wilfully and intentionally failed and refused to do that portion of the work which under the terms of the agreement between the said Macris and the Plaintiff were to be done by said Macris prior to the work to be done by Plaintiff, namely: Wilfully failing and refusing to make the excavations in a proper manner, wilfully failing and refusing to do grading in a proper manner and wil-

fully failing and refusing to furnish the kind, quantity and quality of lumber required to be furnished by them as a condition precedent to the performance of Plaintiff's portion of the work, all designed and intended to and in fact causing Plaintiff considerable unnecessary delay and greatly increased cost, and further, wilfully and intentionally failing and refusing to make the payments required under said sub-contract; all of which acts and omissions were continuous from the inception of the work by the Plaintiff to the end of the job.

And although it was not known to Plaintiff at the time of commission thereof, said acts were the acts not only of said defendants Macri but also of their silent joint venturers Philp and Goerig and the said Continental Casualty Company."

Now, that is as far as the Macris were concerned, and that related to the subcontract between the Macris and the Appellant Schaefer, and that matter was all gone into in the action which the Appellant brought against the Macris in the Yakima court, before Judge Driver, and in which Judge Driver gave damages to the Plaintiff in the sum of $57,000.00, which later was paid and satisfied.

Now, there was nothing unlawful that the Macris did in any of that, and there is nothing that is alleged that was unlawful.

Now, the second allegation of conspiracy set out in Subdivision (B) of the same portion of the complaint that I just read to you, which was Paragraph (A)—now, Sub-paragraph (B) reads: "On or about

the 15th day of July, 1944, in furtherance of said conspiracy, defendants Philp and Goerig and said Macris entered into an alleged agreement (copy attached as Exhibit B,) and by this reference thereto made a part hereof, as though set out herein in full, terminating said joint venture agreement of December 11, 1943. Said alleged termination agreement was fictitious and was executed solely to confuse the facts and deprive Plaintiff of a cause of suit or action against Philp and Goerig."

He said that these people entered into a fictitious joint venture agreement on or about July 15, 1944, and therefore it was an act of conspiracy. I submit, Gentlemen, and Your Honors, that there was nothing illegal in that; nothing illegal at all with relation to their conduct.

The next stop that he makes is in Sub-paragraph (F) as set forth in Paragraph 6 of this complaint: "In furtherance of the conspiracy, said Defendants and each of them caused a suit to be filed in the Circuit Court of the State of Oregon, for the County of Multnomah on the 14th of December, 1945, a copy of the complaint and summons wherein I attached to Exhibit A, and by this reference made a part hereof, as though set out herein in full, wherein the Defendants Macri alleged that they had suffered damages in the amount of $40,000.00 by virtue of Plaintiff's alleged breach of said second subcontract, dated April 21, 1944, which said suit was malicious, wilful abuse of legal process, was without any proper cause whatsoever,

and was filed for the sole purpose of, and in fact had the effect of drying up Plaintiff's credit, causing him to fear damage to his business in Portland, and reducing him to such an impecunious financial condition as to make it virtually impossible to continue the prosecution of the threatened suit in Yakima, Washington, and the filing of the suit in Oregon was possible only because of the omission of the Defendant McKelvy to terminate said second contract as heretofore alleged."

There was nothing illegal in the filing of that action. The Appellant admitted when Judge Driver asked him if there was some conflict between him and the Macris, he said so in his own complaint, that there was conflict going on all the time.

The Macris had as much right to start action against him in court as he did.

In the Puget Sound Power & Light Company versus Asia (1921) II Fed. (2d) it is stated that the filing of an action is not conspiracy.

There are no further overt acts of the Macris alleged in the second complaint, unless the Appellant contends that the Macris in defending themselves in the action which he brought in Yakima, and in taking an appeal from that court, committed an unlawful and overt act in furtherance of the conspiracy mentioned.

There is no further allegation what the Macris did in that respect.

It is true that the appeal was taken, and that Continental Casualty Company helped the Macris

in their appeal, and Continental issued a check satisfying the judgment which had some words that were offensive to the Plaintiff, so that it was removed from the draft. There were no further allegations made. Now, in point of time, with respect to the Statute of Limitations, this subcontract was signed March 14, 1944, the action was brought in that subcontract; Mr. McKelvy came into the picture in 1944, November 1st, I think, and I think the case which arose out of the subcontract was filed December 20, 1945.

The appeal from the second case was taken to this court on May 9, 1947, and this action was filed on December 1st, 1950, so that no matter what consideration could be given to the appeal, there could be no way we could avoid the Statute of Limitations, because no action is alleged,—

JUDGE HEALY: Then what is the applicable statute?

MR. EGAN: Second Federal 3. There is one case which has, I believe, been construed by the parties in Federal Second, which I referred to, in which the parties through the action agreed as to what the Statute of Limitations with respect to conspiracy cases was, and the trial court evidently acknowledged it, and Your Honors must have acknowledged it, because we can't find any place where anyone—

JUDGE HEALY: What does Mr. Schaefer say the statute is? Two years, or three years?

MR. EGAN: Mr. Schaefer contends it has never been decided,—that there is no decision on it.

JUDGE HEALY: It will be either two or three years?

MR. EGAN: Either one or the other; I assume it is three. The appeal was taken in May of 1947, and this action filed in December of 1950, which is in excess of the three years' limitation.

I don't suppose I should make any reference to what the Appellant has said,—it is all one to me—but now I am in the same position as Judge Driver,—I try to do a kindness to the Appellant. He was referring to the State Construction Company and Stateside Construction Company in his argument to the Court, and I told him young Macri had founded the Stateside Construction and it had nothing to do with the State Construction Company, but that is possible for him to find out, and that developed all of the rest of this rigmarole.

I am sorry that he makes so terrible an accusation in his brief against me, but I suppose, considering that I am in such good company as Judge Driver,—

JUDGE HEALY: Are you a Defendant in this case?

MR. EGAN: I thought I was for a while this morning, your Honor.

I submit, your Honors, that the opinion of the lower Court, and its decision, should be sustained.

JUDGE HEALY: It will be submitted.

STATE OF OREGON,)
) ss.
County of Multnomah)

I, M. C. Schaefer, hereby certify that the foregoing is a true, correct and complete copy of the Transcript of Proceedings before the Circuit Court of Appeals on April 9, 1952 as supplied to me by Glen W. Walston, Official Court Reporter.

s/ M. C. SCHAEFER.

APPENDIX 9

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 13129

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, et al.,

Appellees.

AFFIDAVIT

STATE OF OREGON,)
) ss.
County of Multnomah)

I, M. C. SCHAEFER, being first duly sworn, depose and say:

That I am appellant in the above entitled cause.

That at the hearing of my appeal before the Circuit Court of Appeals from the Order of Dismissal entered in the District Court, the record of the proceedings was reported by one Glen W. Walston, official court reporter.

I paid Mr. Walston for an original and three copies of a transcript of said proceeding and finally received what he submitted to me as true copies, but which he failed to certify as such. Upon checking them, I found they were inaccurate in many ways and accordingly wrote him a letter on April 29, 1952, as follows:

"Dear Mr. Walston: After the hearing on April 9, 1952, I came to your office and ordered transcript of the hearing on that day. You told me that it would take about two weeks to get it out, and requested that I bring or mail to you the copies of the papers and books from which I had read into the record. I asked you if it was customary to do that, and you said it was, and that it was necessary to get the proper punctuation.

"So the next day I delivered to you the papers and books from which I had read into the record. I then asked you to get out an original and four copies and asked about how much my bill would be, roughly. You told me it would be about $80.00 and said that would be a guess. I said that the main thing was that I wanted this record to be true, accurate and complete; that I had had other than that kind of experience with a previous transcript. You told me that you knew about that and said that this would be a complete and true transcript. I then gave you a cash deposit on account and left your office.

"On Wednesday, April 23, 1952, I phoned your office and talked to you. You said you would mail the transcripts to me as soon as they were finished. I said that I would come up Friday and pick them up and pay for them, if they were ready, as I wanted to get a copy into the mail by the end of the week for sure. You told me they would be ready by then. I again asked that you be sure that they were true and complete as I did not like to burn any one up for a thing like this, that it is not my nature and that the necessity to do so apparently hurts me more than it does some other people I know. You again said it would be true and complete, that I needn't worry about that.

"So on Friday, April 25, 1952, at about 3:30 p.m., my wife and I arrived at your office. You handed to me the copies of the transcript, and I said, 'But I ordered an original and four copies.' You looked at the bill and said, 'I think it was an original and three copies.' I then said, 'No, it was five total, but that's o.k.; if I require additional, I will order more than that anyway.' Your wife then said, 'I think you are wrong, Glen; it was five that Mr. Schaefer ordered.' You then said, 'That may be right. Altha got the other one.' I said, 'That's Mrs. Curry of the McKelvy office?' and you said it was. I asked if Mr. Croson had ordered, and you said he had not, that you had tried to get in touch with him but were unable to contact him. You asked when I would know whether I wanted additional copies. I told you I thought I would know the first part of next week. I paid the balance of the bill and left your office.

"My wife and I came back to your office on Monday, April 28, 1952, at about 11:40 a.m. and waited a while before you came in. When you came in you asked us into your private office and I told you of twelve errors in the transcript and asked you to check your notes against the transcript. You told me your notes were home and that you lived on Vashon Island, and asked me to tell you what the errors were and you would make the corrections in the transcripts right then. I said, 'Or perhaps you can do it by letter.' You said, 'Well, let's go over them and I think I can recognize if they are changes that should be made.' I said, 'O.K. I am anxious to get a copy down to the Circuit Court of Appeals as soon as possible and of course will want a certificate that this is a true and complete transcript of all that was said at this hearing.' You then made nine corrections in the original and two copies of the transcript. At the time I questioned the typed 'Mr.' and the inked-in 'Olson'

on page 6, line 18, following the words, 'No, no.' I said, 'I don't know about this. If there is a name mentioned here it would be Macri and not Olson. That should be checked.' I then asked you to go over your notes and send me a letter containing the corrections with copies, for each of the transcripts together with your certificates, and that I would like to receive these papers by the end of the week. I then referred to the following defections as being others that required correction: that there had been more said about the 78-page complaint by Mr. Croson; there was some talk about an oral decision in this case being rendered by Judge Driver and that Egan talked of having some pride. You then said, 'I've had an awful time on this; the girl I had on the first part of this work was drunk and we really had quite a time of it. I've made only one mistake in the last three years and that wasn't on my part; the typist typed "did" instead of "didn't" in a brief.' Your wife then, coming toward your office from another office, said: 'Don't say that; I heard that, you know what will happen when you say a thing like that.' And you said, 'Yes, I know, I should knock on wood. I think that should cover all the errors, and I will check my notes and write up all additional changes and mail this with the certificates to you in a few days.' I said, 'I do not believe my case hinges on this transcript, and the opposition have only a lot of garbled material in it, but I do want it to be true and complete to better serve its purpose in the Circuit Court of Appeals as well as for any other purpose I may wish to use it.' We then went into another office where you then rebound the transcripts. You, your wife and two office girls all talked of this girl that had done this typing. You wife said that this girl had come from a mental hospital and 'oh, was she drunk!' and the girl in the furthest

office from your own said, 'Why, that girl didn't know whether it was Wednesday or Saturday,' etc., etc. Now after coming home to Portland I perused the transcripts again and found other errors and also found that the correction made on page 6, line 18, following 'No, no,' the words 'Mr. Macri' should be deleted.

"I now therefore request that you forthwith get up and transmit to me an original and four copies of corrected transcript including in the back of each a proper reporter's certificate.

"I am indeed sorry that it has become necessary for me to write this letter. I am mindful of the many facets of this litigation, mindful that truth is always the victor, whether it be in the laboratory, in mathematics or in any other matter, and that it is the only thing worth fighting for, to preserve or to prevent defection from; and I am hopeful that we will all have a better understanding of the law of truth after this case is resolved.

"Hopeful that I might acknowledge early receipt of the above mentioned corrected transcripts, I remain,

"Yours truly, etc."

On May 2, 1952, he wrote me an answer to my letter of April 29, 1952, as follows:

"Dear Sir: Replying to your letter of April 29, 1952, please return the original and three copies of the transcript and I will recheck them against my notes, make any indicated corrections, certificate and return them promptly.

"Also, please indicate how many copies you wish to end up with, whether original and three, four, or whatever the number may be. I promised you I would make any additional

copies, which I will do. Additional copies sell at .20 per page.

"Respectfully, etc."

"P. S. Suggest you return by either special delivery, or Greyhound Express, which is overnight service."

On May 1, 1952, he called me long distance, and the substance of that conversation is contained in my letter of June 11, 1952, as follows:

"Dear Sir: This will acknowledge your letter of May 2, 1952, in reply to mine dated April 29, 1952.

"In your letter of May 2, 1952, you make no reference at all to our long distance conversation of May 1, 1952. At the time I made a file memo of our conversation as follows:

"Walston called about 3:30 p.m., May 1, 1952, and said: 'I got your letter and have those corrections we talked about; and now if I understand you, you want additional copies.' I said, 'No, I want new and correct copies for those I have, the original and three. After I got home and after the conversation about the girl who did the typing, I find there are many other errors.' You said, 'Well, you tell me what they are and I'll correct them.' I said, 'You go over your notes and make up correct copies from them. It's not for me to be telling you; I've told you a couple of times as per the letter that I wanted true and complete transcripts, and as you said, you only made one mistake in three years and that wasn't your mistake.' You then said: 'It's the hardest thing to do in Federal Court to get it all when you are so far away and some of it is mumbled as when the judges mumble.' I said, 'That's up to you; the people I had sitting back in the benches heard it and

know of many of the errors.' I asked if you had gone over your notes on this. You said, 'No, only as to the errors you talked about.' I said, 'I wanted these transcripts to send to the Circuit Court before their deciding, but they have decided; and I'm going to appeal to the Supreme Court and straighten this damnable thing out if it's the last thing I'll ever do. I'm not in the contracting game now; I've leased it and am going to devote the rest of my time to straightening out some of this kind of rottenness and see if somehow, some way, truth can't win out. I'm not making any charges that someone told you what to leave out, but in my business if I had some drunk or other incompetent party working for me, it's my responsibility'. You said: 'But what if it's the best I could get?' I said, 'If that's the best, I will go after and fight for having wire or other recorders used in court. You get out correct transcripts or I'm filing affidavits.' I said, 'Just as one of the additional errors, the judge said we will give him the benefit of the doubt.' You said, 'Yes, I remember; that was in connection with the statute of limitations.' I said, 'Yes.' You said, 'What other mistakes are there?' I said, 'You go through your notes and make the transcripts from them.' You said, 'I'll do the best I can; that's all I can do.' I said, 'Well, the best you can do is all you can do.' You said, 'How soon do you want them? I said, 'As soon as I can. In a week?' You said, 'All right; I'll get them to you by then, including the certificates.'

"You promises on May 1, 1952, to go through your notes carefully and do the best you could to give me a transcript that was correct and further promised to get them to me in a week.

"It has now been almost six weeks and you still have not sent them. I demand that you do so promptly.

"Very truly yours, etc."

I make this affidavit for the purpose of showing the facts that there are errors in the original transcript prepared by Mr. Walston, and my efforts to get a correct transcript.

I swear under oath that all the material set forth in my letters and file memo incorporated herein is true and correct to the best of my knowledge and belief, So Help Me God.

s/ M. C. SCHAEFER.

Subscribed and sworn to before me this 11th day of June, 1952.

GOLDADA W. TOOKE
Notary Public for Oregon
My commission expires 6-11-54

89

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CHARLES ELMORE

No. 313

Supreme Court of the United States

OCTOBER TERM, 1952

M. C. SCHAEFER, *Petitioner,*

— vs. —

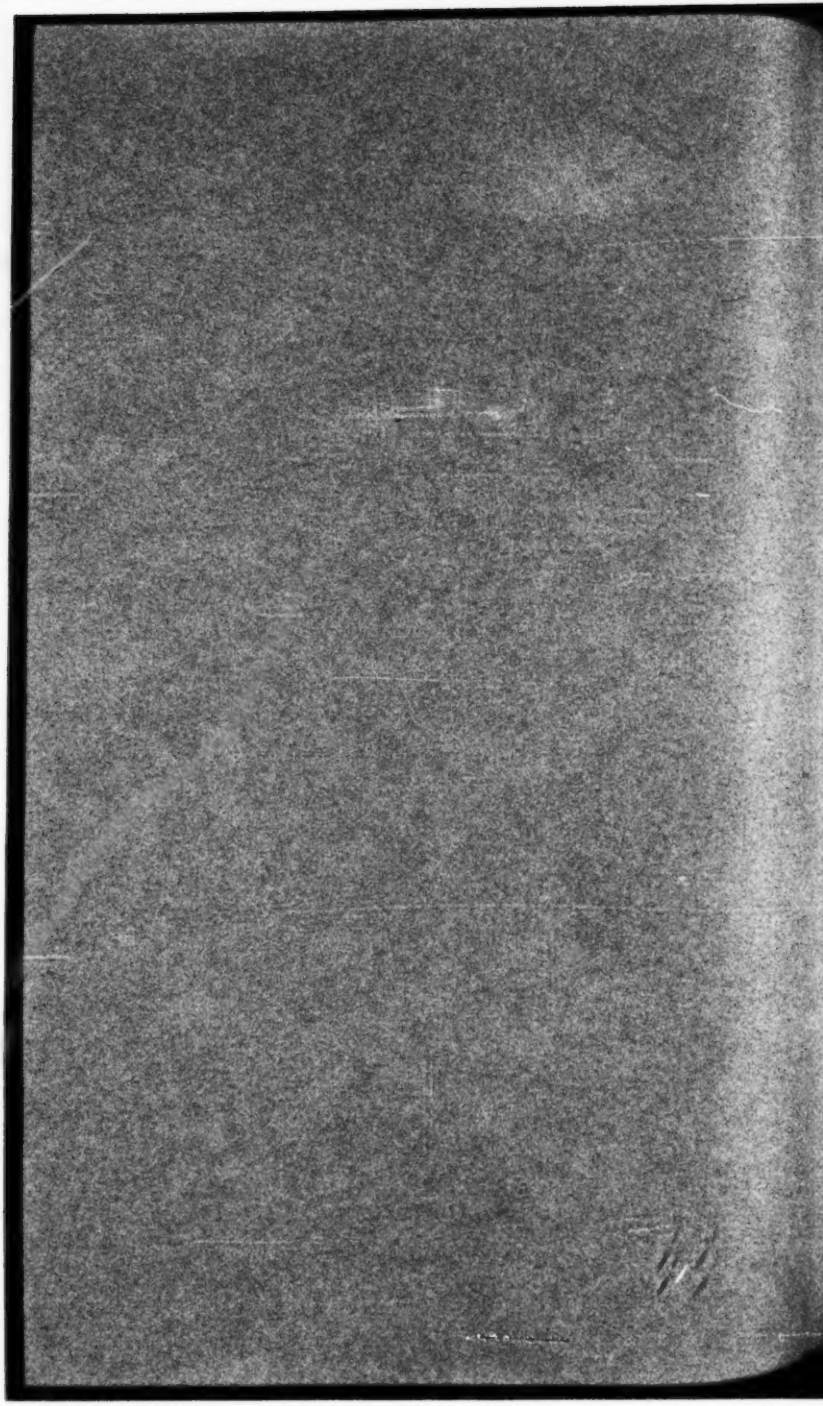
SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation, *Respondents.*

RESPONDENT McKELVY'S BRIEF DIRECTED TO PETITION FOR WRIT OF CERTIORARI

HARRY HENKE, JR.,
Attorney for Respondent W. R. McKelvy.

914 Insurance Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE



No. 213

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BRIEF OF CONTINENTAL CASUALTY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE ARGUS PRESS, SEATTLE

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Rules of Civil Procedure, Rule 8(a) 29
Rule 8(e)(1) 29

Supreme Court of the United States

OCTOBER TERM, 1952

M. C. SCHAEFER, *Petitioner*,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R. MCKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation, *Respondents*.

No. 213

BRIEF OF CONTINENTAL CASUALTY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESTATEMENT OF THE CASE

The sole issue involved in the petition of M. C. Schaefer for Writ of Certiorari is as follows:

Does Petitioner state sufficient grounds for the issuance of the Writ?

This Respondent, in presenting a brief statement of the case, will endeavor to show the Supreme Court that there are no grounds for complaint by Petitioner in so far as judge or counsel are concerned and that there was no abuse of discretion by any judge who heard this matter.

This action was filed by the Petitioner in the United States District Court for the Western District of Washington, Northern Division, on December 1, 1950 (R. 3-12).* Respondent, Continental Casualty Company, on

* R. indicates reference to page of the Record.

December 27, 1950, filed its Motion to Dismiss on the grounds of failure to state a claim and the bar of the statute of limitations (R. 13-14). This motion came on for hearing before Judge John C. Bowen on January 9, 1951, and was assigned to visiting Judge Dal M. Lemmon (R. 15-36). The matter was heard before Judge Lemmon on January 11, 1951 (R. 215-262) and an Order dismissing the Complaint was entered on February 7, 1951 (R. 39-40). Petitioner filed his First Amended Complaint on February 9, 1951 (R. 42-182) and Respondent, Continental Casualty Company, on February 19, 1951, filed its Motion to Dismiss on the grounds of failure to state a claim, the bar of the statute of limitations and violation of Rule 8 (R. 187-195). This motion came on to be heard before visiting Judge Sam M. Driver on April 16, 1951 (R. 279-360) and an Order dismissing the Amended Complaint was entered on May 16, 1951 (R. 365-367). Petitioner filed a Second Amended Complaint on June 15, 1951 (R. 367-498) and Respondent, Continental Casualty Company, filed its Motion to Dismiss on June 25, 1951 (R. 500-501), again reciting the grounds of failure to state a claim and the bar of the statute of limitations. The Motion was heard before Judge William J. Lindberg on August 6, 1951 (R. 555-636) and the Order dismissing the Second Amended Complaint with prejudice was entered on August 7, 1951 (R. 532-534). The Order was general in form and without specification of grounds.

Petitioner thereupon perfected an appeal to the United States Court of Appeals for the Ninth Circuit (R. 535-539, 644-654). The matter came on for hearing be-

fore Circuit Judges Healy, Bone and Pope on April 9, 1952 (R. 655). On April 25, 1952, the Circuit Court rendered its opinion and judgment affirming the decision of the District Court (R. 655-658).

Petitioner thereupon filed with this Court his petition for Writ of Certiorari and supporting brief. He urges, as a ground for issuance of the Writ, the unusual and irregular conduct of the Circuit Court and four District Court judges (P. 17)* as well as the error in law of the Circuit Court in affirming the decision of the District Court, dismissing Petitioner's Second Amended Complaint.

ARGUMENT

1. Summary.

It is this Respondent's position that Petitioner has stated no grounds whatsoever for the issuance of a Writ of Certiorari. It is this Respondent's contention, first, that there was no irregular conduct by any judge, and, second, that there was no error in law because the Second Amended Complaint does not state a cause of action against Respondent, Continental Casualty Company; because if a cause of action is stated, it is barred by the applicable statute of limitations in the State of Washington; because Petitioner cannot state a cause of action against this Respondent; because if a cause of action is stated, which is not barred by the statute of limitations, the Second Amended Complaint, as well as those which preceded it, is so verbose, prolix and redundant as to be subject to a Motion to Dismiss for failure to state a claim in simple, concise and direct terminolo-

* P. indicates reference to page of the Petition.

gy; and because there was no abuse of discretion in dismissing the Second Amended Complaint with prejudice.

2. Does the Record Disclose Any Irregular Conduct by the District Courts or Appellate Court?

There are no special and important reasons for granting Petitioner a Writ of Certiorari. The decision of the Circuit Court does not create a conflict with the decision of another Circuit Court, nor decide an important question of local law in conflict with applicable local decisions. It does not decide an important question of federal law either unsettled by this Court or in conflict with applicable decisions of this Court. Petitioner seeks to invoke the intervention of the Supreme Court on the ground that the Circuit Court departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision.

Analyzing the latter ground more carefully, it means that the Petitioner is seeking a Writ of Certiorari on the ground that the Circuit Court and District Courts both held against him. It is this fact which Petitioner seeks to clothe in garments of departure from the "accepted and usual course of judicial proceedings" (P. 8-17).

The first judge to come under Petitioner's attack is District Judge John C. Bowen (P. 9) who actually never heard the case in full. He made no finding that Petitioner's complaint stated a cause of action or that the statute of limitations had not run (R. 15-36). His as-

signment of the case to District Judge Dal M. Lemmon was approved by Petitioner (R. 33).

The next judge to be criticized is District Judge Dal M. Lemmon, who is alleged to have acted irregularly because he granted Respondent's Motion to Dismiss (P. 10). The record discloses the abundant advice and counsel given to Petitioner by Judge Lemmon on the proper manner of pleading a claim (R. 215-262).

The greatest amount of abuse is heaped on District Judge Sam M. Driver, who is credited with a series of "unwarranted and completely false statements" (P. 12). Nowhere in the record does Petitioner show that any remark of Judge Driver's is false. Again the record discloses considerable judicial advice given to Petitioner on the proper manner of stating a claim (R. 279-360).

Finally, Petitioner finds fault with Judge William J. Lindberg whom Petitioner quotes as having said that the complaint stated a cause of action and that the statute of limitations had not run. Petitioner cites no portion of the record to substantiate this quotation and in fact there is none (R. 637-643). Neither does the Record bear out the purported remarks by counsel for this Respondent. In fact, Petitioner attempts to cover up for the absence of such a record by including the court reporters in his attack (P. 13-14).

The Petitioner next criticizes the Circuit Court of Appeals. He first finds fault with the setting of the hearing in Seattle (P. 15) although five of six counsel were located in Seattle (R. 1). Then he infers that three Circuit Judges were compromised because they attended, on the day of argument, a luncheon of the Seattle

Bar Association at which the Judges were the guests of honor (P. 16).

Finally, Petitioner attacks the three attorneys who argued the case in the Circuit Court. None of the three acts of "reprehensible conduct" (P. 16) are substantiated by the record.

In short, Petitioner has said that a Writ of Certiorari should issue because he did not win his case in either the District Court or the Circuit Court. Because Petitioner did not prevail, Judge Bowen is accused of shirking his duty (P. 9) and participating with Judge Lemmon in a plan to throw Petitioner out of Court without a hearing on the merits (P. 10). Because Petitioner did not prevail, Judge Driver is accused of prejudice (P. 10) and of making false statements (P. 12). Because he did not prevail, Judge Lindberg is accused of incompetence (P. 13). Because he did not prevail, three Circuit Judges are accused of being compromised (P. 16), two reporters are accused of deliberately falsifying the record (P. 13, 16, 106, 113) and three attorneys are accused of reprehensible conduct (P. 16-17).

None of the allegations of the Petition are verified by the record; all are based solely on self-serving declarations and affidavits (P. 106-113, P. 9-17, R. 544, 546, 548, 397, 401, 493, 516). This Respondent contends that the allegations are wholly without foundation and afford Petitioner no basis for the issuance of a Writ of Certiorari. The record amply illustrates the infinite patience with which the lower courts heard the various motions and their attempts to guide and advise Petitioner in the proper manner of stating a claim.

After considering that Judge Lemmon had given careful attention to the first Complaint and that Judge Driver had given similar attention to the first Amended Complaint, and that Judge Lindberg had given careful attention to the Second Amended Complaint, it was certainly not an abuse of discretion on the part of Judge Lindberg to dismiss the action with prejudice; especially when Petitioner himself requested it (R. 635).

3. Did the Circuit Court of Appeals Commit Error in Affirming the District Court?

a. Does the Second Amended Complaint state a cause of action against the Respondent, Continental Casualty Company?

It appears from Paragraphs VI and VII of the Second Amended Complaint (R. 370-385) that the theory of Petitioner's Second Amended Complaint is the recovery of damages for wrongs done by the named defendants pursuant to a civil conspiracy to injure him.

It is the well established rule that the law of the State of Washington controls the decision in this case. *Erie R. R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L. ed. 1188. According to the law of Washington, a civil conspiracy is a combination of two or more persons, acting in concert, to accomplish an unlawful purpose or some purpose not in itself unlawful, by unlawful means.

Dart v. McDonald, 107 Wash. 537, 182 Pac. 628;

Eyak River Packing Co. v. Huglen, 143 Wash. 229, 255 Pac. 123;

Kietz v. Gold Point Mines, Inc., 5 Wn.(2d) 224, 105 P.(2d) 71.

The vital elements of a civil conspiracy are:

(1) a preconceived plan to accomplish the purpose,

(2) common design to accomplish the purpose,

(3) a meeting of the minds, or agreement, to accomplish the purpose,

(4) an overt act, pursuant to the plan, to accomplish the purpose,

(5) an unlawful purpose, or use of unlawful means to accomplish it,

(6) damage resulting from the overt acts of the conspirators.

In *Sobin v. Frederick*, 236 Mich. 501, 211 N.W. 71, we find an example of Element No. 1. In that case, plaintiff, owner of a candy store, gave a mortgage on his candy stock to defendant to secure a sale of candy. The mortgagee later foreclosed his security. Plaintiff thereafter sued the mortgagee, the sheriff and the buyer at the sale for damages for alleged conspiracy. Said the Court, at page 74:

> "There can be no ex post facto conspiracy to do that which has already been done. The root principle upon which the law of conspiracy rests is a preconceived plan to unlawfully work some public or private wrong or injury by concerted action, originating in combination, either carried out by joint action, or at least, pursuant to a joint arrangement and understanding."

See, also, *Ransom v. Matson Navigation Co.* (D.C., Wash.) 1 F.Supp. 244, 246; *State of Mo. ex rel. and to*

use of DeVault v. Fidelity and Casualty Co., 107 F.(2d) 343, 348.

In *U. S. v. American Column & Lumber Co.* (D.C., Tenn.) 263 Fed. 147, 151, a prosecution for conspiracy to violate the Anti-Trust Act, the Court made the following comment on Elements No. 2 and No. 3:

> "The first question arising is whether the defendants in associating themselves together under the so-called 'open competition plan,' thereby formed a combination or conspiracy. In other words, was there in the minds of two or more of the defendants a design to accomplish by and through the plan a common purpose? If so, there was a combination or conspiracy since a combination or conspiracy consists only in a mere meeting of the minds of two or more persons to accomplish a common purpose."

To the same effect, see *Mox, Inc. v. Woods*, 202 Cal. 676, 262 Pac. 302.

Wells v. Lloyd, 6 Cal.(2d) 70, 56 P.(2d) 517;

Ashby v. Peters, 128 Neb. 338, 258 N.W. 639, 99 A.L.R. 843;

Gerdes v. Reynolds, 30 N.Y.S.(2d) 755;

Burton v. Maupin (Mo. App.) 281 S.W. 83.

In the last cited case, the court adds this warning, at page 89:

> " 'The mere knowledge, acquiescence, or approval of the act, without cooperation, or agreement to cooperate, is not enough to constitute one a party to the conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose.' 12 C. J. 544."

The Washington cases support the general rule cited above concerning common design and agreement. In *Dart v. McDonald, supra,* plaintiff sued defendant and wife for damages for a conspiracy to sell stock in a land development company. Defendant owned the land which he sold to the corporation for a much larger price than he paid for it. The business failed. Plaintiff was one of the unsuspecting stockholders. Defendant's wife held no stock in the corporation but plaintiff sought to hold her liable. Said the court at page 540:

> "Before Mrs. McDonald can be held liable it must be shown that she was a party to the conspiracy prior to the time the respondents subscribed for stock. It is unnecessary to cite authorities to the proposition that before a party can be held liable as a conspirator, the evidence must show that such a person entered into an agreement with the other conspirators to accomplish the object of the conspiracy."

See, also:

Kietz v. Gold Point Mines, Inc., supra;

Dunlap v. Seattle National Bank, 93 Wash. 568, 161 Pac. 364.

It is true, as stated in *Calcutt v. Gerig,* 271 Fed. 220, 222 (a case cited by Petitioner) that

> "It is sufficient if the proof shows such a concert of action in the commission of the unlawful act or such other facts or circumstances from which the natural inference arises that the unlawul overt act was in furtherance of a common design, intention and purpose of the alleged conspirators to commit the same."

Nevertheless,

> "The mere statement that the parties conspired, or that there was a conspiracy, is not enough. The stated conclusion must be predicated upon facts or circumstances showing that there was collusion, confederation, cooperation and related acts between the parties to carry out conjointly the unlawful enterprise, each to do necessary acts to effect the joint enterprise." *Ransom v. Matson Navigation Co., supra,* at page 246.

The fourth element is the overt act, without which there can be no conspiracy.

> "The gravamen of a civil action for conspiracy is found in the overt act which results from the conspiracy and culminates in damage to the plaintiff." *Park-in Theatres, Inc. v. Paramount-Richards Theatres* (D.C., Md.) 90 F.Supp. 727, 729.

See also:

Moffett v. Commerce Trust Co., 75 F.Supp. 303

Mox, Inc. v. Woods, supra.

In this regard, the case of *Neustadt v. Employers Liability Assurance Corp. Ltd.,* 303 Mass. 303, 21 N.E.(2d) 538 is worth noting. Plaintiff sought to enjoin three insurance companies from conspiring to take his automobile liability insurance business and in dealing with his customers directly. Demurrers were sustained, the court saying, at page 540,

> "But the effect of the charge that the defendants conspired together is to fix a joint liability on the defendants. The mere allegation that the defendants conspired with respect to the plaintiff, standing by itself does not constitute ground for civil relief. If there is no tort set out as to a single defendant, the charge of conspiracy adds nothing . . . ."

The fifth element is well stated in *Kietz v. Gold Point Mines, Inc., supra,* wherein the court quoted from 15 C.J.S. Conspiracy, 998, §3, at page 231 as follows:

> "To constitute a conspiracy the purpose to be effected by it must be unlawful in its nature or in the means to be employed for its accomplishment, and, where the object in view is lawful and no unlawful means are used, there can be no civil action for conspiracy, even though defendants acted with malicious motives."

Commenting on pleadings in a conspiracy action, the same court said in *Dart v. McDonald, supra,* at page 543,

> "It is true that it is not necessary, in order to establish the fraudulent conspiracy, that it be shown by direct evidence. It may be established by facts and circumstances; but as above stated, these facts and circumstances must be inconsistent with an honest purpose and reasonably consistent only with the intent to defraud . . . . "

The sixth element concerns the damages suffered as a proximate result of the acts of the conspirators. As was well stated in *Moffett v. Commerce Trust Co., supra,* at page 304,

> "... the gist or gravamen of the action is not the conspiracy itself, but the civil wrong done under the conspiracy and which wrong or wrongs resulted in damage to plaintiff."

To the same effect, see:

Park-in Theatres, Inc. v. Paramount-Richards Theatres, supra;

Mox, Inc. v. Woods, supra.

In *Patten v. Dennis,* 134 F.(2d) 137, the court said that a cause of action does not consist of acts but of the unlawful violation of a right which the facts show. And in *Black & Yates Inc. v. Mahogany Association, Inc.,* 129 F.(2d) 227, 231, the court stated,

> "A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment."

Applying the legal rules stated above to the allegations of the Second Amended Complaint, it readily appears that Petitioner has failed to state a cause of action against Continental Casualty Co.

Taking the Second Amended Complaint paragraph by paragraph, Paragraph I (R. 367) refers solely to jurisdiction. Paragraph II (R. 368) is a general statement of the relationship between the parties. In this paragraph, Petitioner alleges that Continental was in the bonding business, that Clyde Philp was one of its attorneys-in-fact, that Philp was a partner of Goerig, who together were joint venturers with the Macris, that the Macris had a contract on the Roza Irrigation project, that Petitioner was a subcontractor on that job, that McKelvy was a member of the firm which acted as general counsel for Continental. Paragraph III (R. 369) recites that Continental bonded the Macris on the Roza job and that the bonds were signed by Philp. Paragraph IV (R. 369) spells out the joint venture between Philp & Goerig and the Macris. Paragraph V

(R. 370) alleges the date, March 14, 1944, on which Petitioner signed the subcontract.

At the end of Paragraph V, it is apparent that Petitioner is attempting to tie Continental with the Macris through the person of Clyde Philp, one of its attorneys-in-fact. The pure coincidence of this event is obvious. In addition, it should be noted that Philp's participation could in no way bind Continental to this joint venture, or to the acts of the joint venturers.

A case in point is *Ransom v. Dollar S. S. Line* (D.C., Wash.) 2 F.Supp. 409, wherein plaintiff sued three steamship lines for damages for conspiracy. From the pleadings, it appeared that plaintiff was on board a Matson vessel headed for Honolulu when she was removed to a Nippon Line vessel and imprisoned there by officers of the Dollar Line. Later she was removed to a Dollar vessel and taken to Seattle where she was jailed. Demurrers to the complaint were sustained. In the course of his opinion, Judge Neterer said, at page 410:

> "It has been held that a corporation cannot, in contemplation of the common law, be guilty of conspiracy . . . .
>
> "It may not be said that the employees of one company upon a ship may enter into a conspiracy with the employees of another ship or passenger agent of another ship for treatment of a passenger in the custody of the other ship and formulate a conspiracy of their several employers. Conspiracy is not within the scope of their employment . . . . The regular scope of employment is limited to conduct upon the ship and duties fairly incidental, and where it is sought to hold corporations beyond such

employment and duties fairly incidental, it must be shown by affirmative acts of the corporation through its properly functioning agency.

"Malice or unlawful or fraudulent act is the gist of the action of conspiracy .... Malice may be said to be an intent from which flows any unlawful and injurious act committed without legal justification. It extends to evil designs or a corrupt or wicked motive against someone at the time of the act. And this must come from the corporation."

From this ample quotation, it would appear that the mere fact that Philp, as attorney-in-fact for Continental, signed the Macri performance bonds could in no way commit Continental to any joint venture with the Macris. Thus the allegation which purport to tie Continental to the joint venture are without legal effect.

Paragraph VI (R. 370) is the crux of Petitioner's Second Amended Complaint. Petitioner commences this paragraph with the following words:

"That defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage and defraud the plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said subcontract dated March 15, 1944, to and including Au-

gust 18, 1950, said acts consisting in principal part, of the following:"

These words standing alone do not set forth a conspiracy within the meaning of the legal rules already cited. In the first place, this particular set of words is subject to the criticism against legal conclusions stated in *Black & Yates, Inc. v. Mahogany Association, Inc., supra.* To correct this obvious defect, Petitioner then attempts to set forth a series of overt acts, numbered A through K (R. 370-384). Petitioner fails, however, to correct his deficient pleading of a "preconceived plan" and agreement to injure Petitioner. Not one fact is alleged in the entire complaint which complies with the rule of *Ransom v. Matson Navigation Co., supra,* which requires the stated conclusion to be predicated on "facts or circumstances showing that there was collusion, confederation, cooperation and related acts between the parties to carry out conjointly the unlawful enterprise." Every attempt to set forth such facts is merely a statement of the same legal conclusion: "in furtherance of said conspiracy" (R. 370, 371, 378, 379, 381, 383 (2)) or words of similar import: "became a co-conspirator" (R. 372), "in concert with the other defendants" (R. 378). Such conclusions do not comply with the rules cited. Nowhere has Petitioner pleaded facts which show a "common design," "a preconceived plan" or "a meeting of the minds, or agreement" to accomplish the alleged purpose. For this reason alone, the Second Amended Complaint does not state facts sufficient to constitute a cause of action against Continental.

From elements No. 4 and No. 5, we know that Peti-

tioner must allege overt acts against Respondent which must be torts or which must result in an unlawful purpose. None of the eleven so-called tortious acts related by Petitioner are in fact torts. In Paragraph VI-A (R. 370) Petitioner sets out the Macris' breach of contract on the Roza project. A breach of contract is not a tort. The allegation that the breach by the Macris was participated in by Continental is a nullity as already shown. Since Philp's only contact with Continental was as attorney-in-fact, he could not bind Continental to Macri in such status. In Paragraph VI-B (R. 371), Petitioner sets out the termination of the joint venture. Surely this is not a tort. In Paragraph VI-C (R. 372-375) Petitioner relates the employment of McKelvy to sue Macri and Continental, the bonding company. This paragraph merely recites the history of dealings between Schaefer and McKelvy and shows no overt act or tort. In Paragraph VI-D (R. 375-378), Petitioner sets out his grievances against McKelvy, including his discovery that McKelvy's firm had represented Continental. The wrong alleged here, if any, is again a breach of contract, this time between attorney and client. In Paragraph VI-E (R. 378) Petitioner relates his hiring of new counsel, and full disclosure of all the facts in the suit against the Macris. No overt acts of any nature are charged. In Paragraph VI-F (R. 379), Petitioner alleges the suit filed by the Macris in Oregon against Petitioner. No reference is made to Continental. This Respondent contends that these facts do not set forth any tort.

In *Puget Sound P. & L. Co. v. Asia* (D.C., Wash.) 2

F.(2d) 491, plaintiff sought to enjoin the defendants from conspiring to force a breach of contract between the plaintiff and the City of Seattle by a suit against the city. A motion to dismiss was granted. Regarding the suit, the court said, at page 492,

> "The only act charged against defendant is the bringing of an action in the State Court, a Court of competent jurisdiction. This was lawful. Fancying they had a grievance and claiming a right in themselves, they had a right to sue . . . and having a right to sue the law does not inquire into the motives.
>
> "A court will not presume that a court of competent jurisdiction will permit itself to be made the instrumentality through which an unlawful purpose may be accomplished."

Further, the law of both Oregon and Washington requires, in order to establish a tort of malicious prosecution, that there be an arrest of the person or seizure of property.

> *Manhattan Quality Clothes v. Cable,* 154 Wash. 654, 283 Pac. 460;
>
> *Hoffman v. Kammel,* 142 Ore. 397, 20 P.(2d) 393.

No such facts are alleged. Therefore, this paragraph shows no overt act.

In Paragraph VI-G (R. 379-381) Petitioner sets out the commencement of his suit in Yakima. In this paragraph, he seeks to make something out of the fact that Continental advised his attorney (Olson) that Philp and Goerig were parties to the contract and hence liable thereunder. Obviously, there would have been no point

in notifying Petitioner of this fact until suit was instituted. Prior knowledge would not have affected Petitioner in any way. Petitioner thereafter relates his victory against all the defendants in both his Yakima suit and on the cross-complaint of the Macris which was the foundation of the earlier Oregon suit. No overt acts are here alleged.

In Paragraph VI-H (R. 381-383), Petitioner notes the progress of his case from the trial court to the Supreme Court of the United States. He seeks to plead overt acts of a tortious nature in applications for new trial, appeal to the Circuit Court of Appeals and *certiorari* to the Supreme Court, in none of which were any of the defendants successful. How the full and complete defense of this suit by Continental could be considered tortious is beyond reason. From Petitioner's Exhibit M (R. 438-461) attached to the Second Amended Complaint, we can easily discover Judge Driver's feelings about this case which Continental is accused of defending. Judge Driver, who tried the Yakima case, said, "Now, coming to the law applicable to this situation, it is of course difficult . . ." (R. 445); ". . . and as I read the cases while there is none that is squarely in point . . ." (R. 446); ". . . this is a close case, and the questions are close and in some respects novel ones; and if the Appellate Court should hold . . ." (R. 455); "Well, I know it is a close and difficult question . . ." (R. 459). These very statements of the trial court show both a justification for defense and an anticipation of appeal. These statements were amplified by Judge Driver at the time of the hearing on the first Amended

Complaint when he said: "It was a very complex series of cases . . ." (R. 337); "Here's a case that was a very close and difficult one, I think." (R. 338). "I thought the chances were not much more than even." (R. 338). "I thought it was a hard-fought, close lawsuit in which I might just as well have found against you as for you, it was that close." (R. 339). From these statements, we can see no overt act alleged in paragraph VI-H.

In Paragraph VI-I (R. 383) Petitioner seeks to make an overt act out of the refusal of Continental to delete words from its release and from the fact that its co-defendants have not paid their judgments to Continental. In fact, the words were deleted. No tort can be deduced from these allegations.

In Paragraph VI-J (R. 383-384), Petitioner alleges an attempt by McKelvy to collect a bill for services. This is not a tort. In Paragraph VI-K (R. 384) Petitioner states that he was unable to get his attorney to sue McKelvy. This is not a tort.

The last paragraph (VII) (R. 384-385) deals solely with damages, repeating again the legal conclusions regarding conspiracy.

In summary, it appears that none of the eleven alleged tortious acts are, in fact, torts. Hence, in order to state a cause of action, Petitioner must show that the purpose itself was unlawful. Here, Petitioner fails, because he has not met the requirement of pleading facts which show a "common design," "preconceived plan" or "meeting of the minds." The intent of one of the Respondents alone to injure Petitioner is not a fact which creates a conspiracy. It requires the cooperation

and confederation of two or more of the Respondents. Without this, the Petitioner has failed to show injury as a result of a conspiracy.

Briefly stated the only overt "acts" alleged are as follows:

(1) breach of contract by Macri (R. 370)

(2) breach of attorney-client contract by McKelvy (R. 372-378)

(3) Macri suit in Oregon (R. 379)

(4) defense of Schaefer suit in Yakima (R. 379-381)

(5) appeals by defendants (R. 381-383)

The termination of the joint venture (R. 371), the hiring of new counsel (R. 378), the deletion of certain words from the bonding company release (R. 383), the inability of McKelvy to collect his bill for services (R. 383-4), and the inability of Schaefer to get Olson to bring this suit (R. 384) are certainly not overt acts.

The Second Amended Complaint shows that Petitioner recovered damages for the Macri breach of contract (R. 380) and against the Macris on their cross-complaint which was the basis of the Oregon suit (R. 381). The Complaint also shows that McKelvy did not prevent Petitioner from bringing his suit (R. 378). The Complaint also shows that Petitioner recovered judgment against Continental, and his costs, all of which were paid (R. 380, 383).

Thus, it would appear that, in fact, Petitioner suffered no damage as a result of any of the five so-called overt acts. His grievance appears to be one which goes to the expense of conducting a law suit. This same ob-

servation was made by Judge Driver in the hearing on the first Amended Complaint when he said:

> "You got almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It's a queer situation. I think perhaps you've come to the realization which many litigants don't, that litigation necessarily and unfortunately is expensive, and that it isn't as profitable even for the winner as is sometimes thought." (R. 339).

It goes without citation that only certain costs of waging a law suit are recoverable. Petitioner has been paid these taxable costs. Now he seeks to recover from the losers non-taxable costs in the form of damages. Actually his damages consist of attorneys' fees and other non-taxable court costs, loss of time and profit because unable to conduct his business in the usual course while attending and preparing a law suit, and the other necessary expenses in connection therewith. These are not damages which are the proximate result of a conspiracy.

For these reasons, this Respondent contends that no cause of action has been stated against Continental Casualty Co.

b. If any cause of action is stated, is it barred by the Statute of Limitations?

Petitioner filed his original Complaint on December 1, 1950 (R. 12). Service was made on this Respondent some days later. The statutes of limitations of the State of Washington govern the decision herein. *No. Ky. Telephone Co. v. So. Bell Tel. & Tel. Co.,* 1 F. Supp.

576. In Washington, the statute of limitations continues to run until the Complaint has been both served and filed. Since there are so few days involved, let us take December 1, 1950, as the cut-off date.

In Washington there are only two possible statutes which are applicable to this case. One is R.C.W. §4.16.080 providing for a three-year limitation on certain actions. The other is R.C.W. §4.16.130 which provides:

> "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

The latter statute applies to conspiracy actions. In *Mitchell v. Greenough,* 100 F.(2d) 184, a case decided on the basis of Washington law, it was agreed by all parties that the two-year statute governed. In support of this case is *State v. Erickson,* 54 Wash. 472, 103 Pac. 796, which was a trial and conviction of the crime of conspiracy to control milk prices. Defendant, during the trial, moved to dismiss the charges on the ground that the conspiracy had ended more than two years before the information was filed. In response the court said, at page 477,

> "It is true that a prior and unsuccessful attempt had been made, but the evidence very clearly shows that there was a renewed agreement and organization which was made within one year prior to the filing of the information. This was the one upon which the present charge was based. The information was therefore filed within time."

The next question to determine is when the cause of action for damages for conspiracy accrues. One of the

clearest answers to this question is found in *No. Ky. Telephone Co. v. So. Bell Tel. & Tel. Co.*, 73 F.(2d) 333, 335, 97 A.L.R. 133.

> "In the instant case there are no overt acts alleged to have been committed within one year prior to the filing of the action. In *Nolle v. Oyster*, 230 U.S. 165 at page 182, 33 S.Ct. 1043, 57 L.ed. 1439, it was said to be a well-settled rule that no civil action will lie for a conspiracy unless there be an overt act that results in damage to the plaintiff. A necessary corollary to this rule would seem to be that, when there is an overt act, or the last of a contemplated series of overt acts, the cause of action accrues and the statute of limitations begins to run. If this were not true, then it would result that, in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficial purpose of the statute to fix a period to the right to sue would be defeated."

On the basis of this authority, it must next be determined whether there was an overt act committed in furtherance of the alleged conspiracy within the period of two years from December 1, 1948, to December 1, 1950.

Working backwards in Petitioner's Second Amended Complaint, the latest date alleged is October 4, 1950 (R. 384), at which time Petitioner's attorney, Olson, refused to take the present suit. Olson is not a party to this action, hence his refusal could not be an overt act of these alleged conspirators. The next date is August 18, 1950 (R. 383), when Petitioner searched Olson's files for correspondence allegedly written by

McKelvy advising Olson about the nature of the action to be brought (R. 384). If the letters were written, they would not be in aid of an alleged conspiracy, and if they were not written, the failure to do so could not be an overt act by McKelvy since his employment had been terminated October 20, 1945 (R. 377), and he would be under no duty to act. The next date alleged is August 16, 1950 (R. 383) when McKelvy attempted to collect his bill for services from Petitioner. Since McKelvy did not collect his bill on this date, there would seem to be no overt act.

The next date takes us back to November 9, 1949 (R. 383), when Continental paid the judgment. Petitioner claims an overt act in the refusal of Continental to delete certain words from its release. The fact remains, however, that the words were deleted; so again, no overt act.

There follows a series of dates regarding the appeal from the decision in the Yakima District Court. Since it is not presumed that the courts were a party to the conspiracy, the dates of decisions will be ignored and only the dates of acts by the Respondents considered. They follow in reverse chronological order:

June 20, 1949—Macri petition for Writ of Certiorari to Supreme Court (R. 382);

May 14, 1949—Continental petition for Writ of Certiorari to Supreme Court (R. 382);

March 10, 1949—Macri petition for rehearing of Circuit Court Decision (R. 382);

March 7, 1949—Continental petition for rehearing of Circuit Court Decision (R. 382);

August 18, 1947—Macri notice of appeal (R. 381);

July 29, 1947—Philp & Goerig notice of appeal (R. 381);

May 20, 1947—Continental notice of appeal R. 381);

May 9, 1947—Continental motion for new trial (R. 381).

This series of dates not only takes us beyond the two-year Statute of Limitations, but also beyond the three-year Statute. Since they are all related acts, they shall be discussed together and the importance of argument over the applicable statute of limitations diminishes.

Is it a tortious act to ask for a new trial, appeal from a decision of a trial court, petition for rehearing or seek a Writ of Certiorari in a case that the trial court describes as "close," "difficult," and "complex," and where the chance of victory is "not much more than even," and where the trial court anticipates that an appeal will follow? (See quotations, *supra.*) Certainly it is no tort. While these acts may be overt in the sense that something was done, there is nothing, inferential or circumstantial, that indicates that these legal steps were taken pursuant to a preconceived plan, common design or agreement of the parties. Hence, this Respondent contends that there were no overt acts in pursuance of a conspiracy which occurred within a period of three years before December 1, 1950, and that for this reason the cause of action is barred by the statutes of limitations without regard to whether the three- or two-year statute applies.

There are no dates alleged in the complaint, later than those heretofore mentioned. No further consideration of the pleadings are necessary for this point in the argument.

c. Did the Circuit Court of Appeals err in affirming the Order of the District Court dismissing the Second Amended Complaint without leave to amend?

The Second Amended Complaint was dismissed by the District Court with prejudice and without leave to amend (R. 532-534). The Circuit Court affirmed this decision. The dismissal should be affirmed where the averments of the Complaint show that the plaintiff cannot state a cause of action upon which he can recover.

Gromacki v. Armour & Co., 76 F. Supp. 752.

Petitioner's original Complaint takes up 9½ pages of the Record (R. 3-12). Motions to Dismiss were heard before the Hon. Dal M. Lemmon who consumed considerable time in advising Appellant on the proper manner of pleading his cause of action (R. 214-262). Petitioner's first Amended Complaint takes up 141 pages of the Record (R. 42-182). In it, Petitioner virtually tries his entire case, setting forth almost all the evidence in his possession. The Motions to Dismiss this Complaint were heard before the Hon. Sam M. Driver who likewise spent considerable time in advising Petitioner on the proper facts to plead to make his complaint safe against motions to dismiss (R. 279-360). The Second Amended Complaint takes up 17½ pages of the Record, and has an additional 112 pages of Exhibits (R. 386-498). It is virtually the same as the first

Amended Complaint except as to form. (See Analysis, R. 528-531). At the time of the hearing of the Motions to Dismiss this Complaint, Petitioner also sought to file a paper denominated "Supplemental Complaint" (R. 516-518). By stipulation of all parties, the facts raised in this paper were to be considered in passing on the Motions to Dismiss (R. 563). The additional facts related therein seek to further prove McKelvy's representation of Continental on other occasions, and seek to add one B. J. Rask as a conspirator. All of the allegations regarding McKelvy and Continental are matters of evidence and are not material facts. The additional party is in no way associated with the other alleged conspirators by any fact or inference except the usual legal conclusion.

Considering the voluminous detail in these three complaints and the "supplemental complaint," all of which was before the Hon. William J. Lindberg in the hearing on the Motion to Dismiss the Second Amended Complaint (R. 555-636), and considering further the advice given to Petitioner by Judges Lemmon and Driver, it would appear that Petitioner has stated all of the facts which may bear on the matter in controversy and that under no possible statement of the facts, can he allege a cause of action. For this reason, the District Court did not err in its order dismissing with prejudice and without leave to amend. In fact, this order was made final at the request of Petitioner, as well as Respondents (R. 610). The affirmance of this Order by the Circuit Court was therefore proper.

d. Does the Second Amended Complaint conform to the Rules of Civil Procedure?

Without waiving any of the foregoing, but in the event this Court should find that Petitioner has stated facts sufficient to state a claim for relief which claim is not barred by the statutes of limitations, then in that event, the Second Amended Complaint should still have been dismissed for failure to comply with the Rules of Civil Procedure.

Rule 8 (a) requires a "short and plain statement of the claim." Rule 8 (e) (1) requires that "each averment of a pleading . . . be simple, concise and direct." The objection that a Complaint is verbose, redundant and prolix in violation of this Rule is properly taken by a Motion to Dismiss.

Capdeville v. Am. Commercial Alcohol Corp., 1 F.R.D. 365;

Buckley v. Music Corp. of America, 1 F.R.D. 603.

Petitioner's Second Amended Complaint is verbose, redundant and prolix and subject to a Motion to Dismiss. By separating his Exhibits from the main body of the Complaint, Petitioner has in no way changed the allegations of the Second Amended Complaint from those of the first Amended Complaint. Judge Driver dismissed the latter for prolixity (R. 365-367). If the Second Amended Complaint is not to be dismissed without leave to amend, then it should still be dismissed for the same reasons as those stated in Judge Driver's opinion.

CONCLUSION

In conclusion, it is this Respondent's position that the application for Writ of Certiorari should be denied for failure of Petitioner to present any grounds which justify the exercise of this Court's sound judicial discretion either through irregular judicial conduct or error of law in the affirmance of the lower Court's decision by the Circuit Court of Appeals for the Ninth Circuit.

Respectfully submitted,

CARL E. CROSON,
Attorney for Respondent,
Continental Casualty Company,
900 Insurance Building,
Seattle 4, Washington.



In the Supreme Court

of the United States

October Term, 1952

No. 213

M. C. SCHAEFER,

Petitioner,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation,

Respondents.

BRIEF OF PETITIONER M. C. SCHAEFER IN REPLY TO BRIEF OF W. R. McKELVY AND CONTINENTAL CASUALTY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

The petitioner claims, and the record proves, that the Law Firm of Skeel, McKelvy, Henke, Evenson & Uhlmann is operating a ruthless, corrupt, and diabolic Lawyer Mill and is the greatest wrongdoer in the conspiracy charged by your Petitioner in the instant suit.

Petitioner charges: that W. R. McKelvy is one of the senior partners of the above law firm; that Continental Casualty Co., is one of the largest clients of this firm's office, and for which this law firm is general counsel in the State of Washington; that Clyde Philp was the Attorney-in-fact for Continental Casualty Co. (a very strategic position for finding out the amount of competitors' proposed bids), and at the same time a purported silent partner of Macri Construction Co., not only on the jobs herein involved but also on many other jobs that were undertaken by this combination, both before and after your Petitioner sub-contracted with them; that the purported Macri Construction Co., has specialized in public work, that they have done much work for the STATE HIGHWAY DEPARTMENT in the State of Washington, but are in fact unable to estimate such work, and are but pseudo-contractors and fronts for the McKelvy office and the Continental Casualty Co.; that Mr. Skeel Sr. of this law firm was a DIRECTOR OF SEVERAL LEADING FINANCIAL, industrial and shipping concerns and has served on the committee for economic development, HIGHWAY AND TRAFFIC STUDY GROUPS, the Community Chest, Rotary International and other organizations; that Tom W. Holman who had been associated in the McKelvy office for a number of years and who still co-operated as though he were still associated in that office was HEAD OF WASHINGTON HIGHWAY DEPARTMENT ADVISORY COMMITTEE, this is the same Tom W. Holman to whom W. R. McKelvy transferred their own stooge and client, the Macri Construction Co.,

on November 1, 1944, the day McKelvy undertook to represent your Petitioner against this, the Macri firm and the Continental Casualty Co. Note carefully, however, that McKelvy transferred to Holman only this one case, and McKelvy continued to represent Macri in other litigation then pending in Seattle and continued such representation for many months (See R. 516-518). This is the same Mr. Holman that managed the court room strategy for all defendants in Plaintiff's quantum-meruit suit in Yakima and who because of Judge Driver's previous association in the McKelvy office was able, after 2 weeks of hearings, to require Plaintiff to go to Boise, Idaho, a distance of approximately 400 miles to take a deposition and who was permitted to protract this Yakima suit for 4 solid 5-day weeks plus the Saturday of the deposition at Boise; that this man Mr. Tom W. Holman was acting as if he were yet in the McKelvy office and was in fact acting as the attorney for Continental Casualty Co., Holman knowing full well that the assets of the Macris and Philp and Goerig were made unavailable to your petitioner and that they would not be required to pay any judgment Continental Casualty Co. might be awarded against them, in event Petitioner would be awarded judgment against either of them or/and Continental Casualty Co.; that Judge Driver knows full well that the use cases of material men, and other sub-contractors were decided at pretrial in January of 1947 and that at the hearing on February 21, 1947, Willard E. Skeel of the above law firm was present to assist Tom W. Holman in making a proper record of the fraudulent concealment of the assets of the

Macris and Philp and Goerig; and that the statements by both Mr. Holman and Mr. Skeel regarding plaintiff not being present are true and that the exhibits referred to at that hearing are those of your Petitioner in the instant case; now adding the how, in which Judge Driver while hearing the instant case, cut in on McKelvy's attorney Mrs. Curry when he saw that she was admitting that McKelvy could be held liable in conspiracy (R. 290) "On 85, line 26, (this appears on lines 19 to 22, R. 172), we have another statement of conspiracy; except for one thing on page 46, the only way you could tie McKelvy in would be on line 5 and 6—" (this appears on last line of R. 115 and first 2 lines of R. 116); here Judge Driver cut in swiftly and changed the subject; "The Court: What is this action for, damages?" Line 5 and 6 on page 46 reads "judgment in the trial court in favor of Plaintiff and against the Defendants of Plaintiff's suit for Quantum Meruit, and", and this she would have perhaps coupled with the fact that in the memorandum, which McKelvy inadvertently handed me on October 20, 1945, in which he states that plaintiff had a cause in quantum meruit; then Judge Driver adds verification to your Petitioner's statement that this law firm is operating a lawyer mill. Petitioner quote, "The Court: Before that it was Skeel and Whitney; I worked there for six months in 1916. Scarcely any member of the bar in the State of Washington hasn't at one time or another. I worked in Skeel and Whitney's office from June to December, 1916, the year I graduated from law school." Your Petitioner further charges this law firm, because of the great va-

riety of financial and political interests, the great number of attorneys they have turned out of their lawyer mill, the great financial, insurance and other interests they represent, do control the local bar association and the Judges; and if that is not enough as in the instant case they turn to threats and intimidation and to having the Court Reporters falsify the records and delay in getting out the transcripts of records; the records, briefs and other papers in this case are replete with half truths, evasions, misstatements, misquotations and outright diabolic falsehoods on the part of the attorneys and their clients, the respondents in this case.

Petitioner further claims that this firm of shyster attorneys, by operating such a lawyer mill, have a license to do anything and are completely immune to all liability from whatever source, except as in the instant case, when because of the above set-up a layman is unable to get an attorney to represent him, he undertakes to prosecute his own lawsuit.

Now in the instant case, this plaintiff, in trying to get justice against this firm of attorneys and their clients first found that he was not able to get an attorney to represent him, next he found that the judges are controlled, they are controlled in the first place perhaps because they get their appointment or the great influence for such appointment from the bar association which is dominated by the McKelvy office, or in combination with other shysters that have had too close a connection with said McKelvy office, and/or that these judges have themselves worked in and are products of this said office; then these local attorneys and judges

dupe around so as to have four controlled judges hold with this, the McKelvy office, and thereby, and with that influence to start with, then invite the circuit court judges to a luncheon of the bar association for the final coup and of course this hearing had to fall on the exact date of such luncheon and in the middle of plaintiff's argument.

ANSWERING RESPONDENT McKELVY'S BRIEF

Answering *Statement*, pages 1 and 2. First of all let me make it very clear that your Petitioner claims no immunity, but what your Petitioner does desire is a chance to have this case go to jury trial as requested in his demand for jury trial filed in the instant case and stop this trickery of throwing him out of court without a trial on the merits, that this Court appoint a judge to hear this case on its merits and that after this civil case is decided, that this Court turn this information over to a congressional crime commission or the Justice Department in Washington, D. C., for further action.

Answering *The Record*, pages 2 and 3 of McKelvy Brief. First answering paragraph 1. This is controverted. Please read the Statement of this reply brief and the Petition for Writ of Certiorari and Brief in Support of Petition. Answering paragraph 2. This is a falsehood. I call it one because, as an attorney this respondent knows full well, the Supreme Court Rule 38, 1 and 7, provides for supplying the records of all proceedings in the Circuit Court of Appeals, and further, your Petitioner called the Clerk of the Circuit Court of Appeals at San Francisco, California, Mr. Paul P. O'Brien, on June 25, 1952, and this clerk said that all briefs, the transcript of hearing before the Circuit Court of Appeals, and any other papers filed subsequently to the printing of the record should be added as an appendix to Petitioner's petition for certiorari and brief to be filed

in the Supreme Court. Answering paragraph 3. This is a deliberate distortion. The Circuit Court of Appeals' language is correctly quoted, but Judge Lemmon made no such finding (R. 215ff); Judge Driver did not (R. 279ff), and neither did Judge Lindberg (R. 555ff and 637ff and R. 532). The transcript of the hearings before Judge Lindberg was deliberately falsified by the Reporter. See full statement of the correct facts on pages 9 to 15 of Petition for Writ of Certiorari with supporting brief.

Answering *Members of the District Appellate Court,* paragraph 1 on pages 3, 4 and 5. Please read Statement of this brief, then Petitioner's Petition for Writ of Certiorari and Brief in Support of Petition; then please read all of the hearing before Judge Bowen (R. 15-36) and particularly (R. 30 to incl. 34) and not only the pages of the record (R. 31-32) as suggested by respondent.

As to Judge Lemmon, please read Statement of this brief, then Petitioner's Petition for Writ of Certiorari and Brief in Support of Petition; then please read all of the hearing before Judge Lemmon (R. 215-262) and not only the pages suggested by the respondent.

As to Judge Driver, please read Statement of this brief; then Petitioner's Petition for Writ of Certiorari and Brief in Support of Petition; then please read all of the hearing before Judge Driver (R. 279-360) in the instant case; and then read this same Judge Driver's opinion in the Quantum Meruit suit in Yakima (R. 438-460). Then please read the photostatic copies of an office memo which respondent McKelvy inadvertently handed

your Petitioner on October 20, 1945 and see that it states the remedy to be quantum meruit recovery (R. 407-410).

As to Judge Lindberg, please read Statement of this brief; then Petitioner's Petition for Writ of Certiorari and Brief in Support of Petition; then please read all of the hearings before Judge Lindberg—the hearing on July 2, 1951 (R. 503-511); the hearing on July 9, 1951 (R. 512-516); the hearing on August 6, 1951 (R. 555-636); the hearing on August 7, 1951 (R. 637-643); on page 5, lines 23 and 24, this is a deliberate falsehood and known to be such. Please read pages 12, 13, 14, and the first paragraph on page 15; the last word on line 2, and the next 4 lines of page 17 of Petition for Writ of Certiorari and Brief in Support of Petition, and pages 71, 72 and 73 of the Appendix thereof; and page 106, Appendix to Petition for Writ of Certiorari.

As to the Circuit Court of Appeals Judges, please read Statement of this brief; then Petitioner's Petition for Certiorari and Brief in Support of Petition; then please read Petitioner's brief and reply brief in the Circuit Court of Appeals, pages 25 to 60, and including the graph attached to the back of page 60; the hearing on April 9, 1952 (pages 60-105); the affidavit regarding the dereliction of the court reporter at this hearing, pages 106-113; then please read R. 631-634.

Answering *Reporters and Counsel,* page 7. First let me say that this is a gross misstatement of facts. Please read Statement of this brief; then please read page 12 to and including the first 6 lines of page 17 of Petition-

er's Petition for Writ of Certiorari and Brief in Support of Petition, and please read all of the references therein given.

Answering *Misstatements of Complaint,* par. 1 on page 7. There is falsehood involved in this paragraph as the respondent McKelvy and his attorney well know that the statement referred to in R. 374 only sets forth what McKelvy told your Petitioner at that time, and neither the complaint, nor your Petitioner recognize Holman as having been the attorney for the Macris, but does claim that McKelvy was at that very moment the attorney for the Macris as alleged in Statement of this brief; line 12 to and incl. 19 on page R. 377; the last par. on page 621 to 1st par. on page 623 of the record; and R. 516-518.

As to *Willard E. Skeel,* please read the above and all references therein cited; then read Statement of this brief; then read R. 415-428.

ANSWERING THE BRIEF OF CONTINENTAL CASUALTY COMPANY

All the remarks made above are by this reference made applicable to Continental's brief. In addition, however, as to Continental I suggest you read all of Judge Driver's opinion (R. 438ff) from which you will see that Judge Driver's opinion was very clear cut in Petitioner's favor. Principally, however, Petitioner's position on Continental's conduct of the Yakima litigation, and appeals in connection therewith is that it was a malicious abuse of the judicial processes and done in furtherance of the conspiracy.

It is interesting to note that Continental and McKelvy both completely evade the real issues, thereby admitting my contentions to be true.

It is further interesting to note that Continental and their attorneys, even before this highest Court in the land, wilfully persist in intentionally misrepresenting and misstating: to-wit, see page 21 of their brief, second full paragraph where they say, "The Second Amended Complaint shows that Petitioner recovered *damages* * * *" (citing R. 380). The citation is to my complaint and actually reads, " * * * and finally resulted in a judgment in favor of Plaintiff and against the defendants Macri, Philp & Goerig, and Continental Casualty Company, for what the trial court thought was the *reasonable value of the services rendered* * * *" (Italics supplied).

Also, on page 18 of their brief they state the law of Oregon on malicious prosecution to include certain elements and cite a case. Neither that case nor any Oregon case that can be found decided by the Oregon Supreme Court involving Oregon law, so holds.

Even should the Oregon Court so hold, it does not get around the fact that this suit was malicious in fact that was part of the conspiracy.

There is not one statement by the opposition that refutes a single statement by your Petitioner. All my allegations are circumscribed by my prayer, Mentor Christ teach these men lawfter.

Time does not permit exhaustive reply to the briefs of Continental and McKelvy as I want this printed and filed by September 10, so as to get on this October term.

Wherefore your Petitioner again respectfully requests that the Prayer of his Petition be granted.

M. C. SCHAEFER,
Petitioner, Per Se.